2004

B.A.M. Development, LLC, a Utah limited liability company v. Salt Lake County, a body corporate and politic of the State of Utah : Brief of Cross-Petitioner

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

B.A.M. DEVELOPMENT, L.L.C., a Utah limited liability company, Cross-Petitioner vs SALT LAKE COUNTY, a body politic and a political subdivision of the State of Utah, Cross-Petitioner	UTAH SUPREME COURT BRIEF UTAH DOCUMENT KFU 45.9 .59 DOCKET NO. 20040365-SC Supreme Court No. 20040365-SC

OPENING BRIEF OF CROSS-PETITIONER B.A.M. DEVELOPMENT

FOR CERTIORARI REVIEW OF A COURT OF APPEALS DECISION

ORIGINAL PROCEEDING IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

The Honorable Timothy R Hanson, District Judge

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ORAL ARGUMENT AND FORMAL OPINION REQUESTED

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B.A.M. DEVELOPMENT, L.L.C., a Utah limited liability company,	
Cross-Petitioner	**OPENING BRIEF OF CROSS-PETITIONER B.A.M. DEVELOPMENT ON WRIT OF CERTIORARI**
vs	
SALT LAKE COUNTY, a Utah body politic and political subdivision of the State of Utah,	**[ORAL ARGUMENT REQUESTED]**
Cross-Petitioner	**Case No. 20040365-SC**

DESIGNATION OF THE PARTIES

Cross-Petitioner B.A.M. DEVELOPMENT, L.L.C. is a Utah limited liability company. Its principal is Scott M McCleary, a natural person. The entity name is derived from the first letters of the first names of Mr McCleary's three adult children: Ben, Ashley and Matt.

Cross-Petitioner SALT LAKE COUNTY is a Utah body politic and political subdivision of the State of Utah.

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vs	
SALT LAKE COUNTY, a Utah body politic and political subdivision of the State of Utah,	**[ORAL ARGUMENT REQUESTED]**
Cross-Petitioner	**Case No. 20040365-SC**

CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision for which certiorari review has been granted is **B.A.M. Development, L.L.C. vs Salt Lake County**, 2004 UT App 34, 87 P.3d 710 (Utah App 2004), decided 20 February 2004, Appellate Case No. 20010840-CA [hereinafter "the Decision"]. A photocopy of the Decision is included herein at APPENDIX #1 of this BRIEF.

STATEMENT OF SUPREME COURT JURISDICTION

Jurisdiction over the "appeal" originally was exercised pursuant to the provisions of Section 78-2-2(3)(j), Utah Code [Supreme Court has original appellate jurisdiction for appeals of civil cases from the District Court]. The Utah Supreme Court "poured over" the case to the Court of Appeals, which issued its opinion on 20 February 2004, 2004 UT App 34, 87 P.3d 710 (Utah App 2004). The Utah Supreme

Court granted the parties' cross-petitions for writ of certiorari in August 2004.

ISSUES AND STANDARD OF REVIEW

This is an "inverse condemnation" case to obtain "just compensation" for "physical takings" of private property, "taken" as development exactions by a government entity as a condition of subdivision development approval. The three issues specified for certiorari review by the Utah Supreme Court of the Court of Appeals Decision are contained with the Utah Supreme Court's August 2004 order, thus:

> Issue #1: Whether the Nollan/Dolan "rough proportionality" test applies where an alleged taking results from a uniform land-use scheme rather than an ad hoc site-specific adjudicative decision. [Hereinafter "Issue #1"]
>
> Issue #2: Whether the Court of Appeals erred in holding the district court's review was limited to the administrative record. [Hereinafter "Issue #2"]
>
> Issue #3: Whether Section 63-90a-4 of the Utah Code permits review regardless of the state of the administrative record. [Hereinafter "Issue #3"]

On certiorari review, the Supreme Court reviews the Decision of the Utah Court of Appeals---not of the trial court---for correctness; the conclusions of law of the Court of Appeals are afforded no deference. **Bear River Mutual Insurance Company vs Wall**, 978 P.2d 460 at 461 (Utah Supreme Court 1999).

Cross-Petitioner B.A.M. DEVELOPMENT strenuously disputes the COUNTY's intentional mischaracterization [p. 2

of its OPENING BRIEF: under the heading "STANDARD OF REVIEW"] of the case as being a "facial challenge" to the Ordinance.[1] This case is an "inverse condemnation" case to obtain "just compensation" (e.g. monetary payment) for unconstitutionally excessive exactions (land dedication and required improvements). In response to the COUNTY's claim that the "standard of review" for the "facial challenge"---which this case primarily isn't---B.A.M. DEVELOPMENT asserts the intentional avoidance of the constitutional proscriptions of the Just Compensation Clause is never a "legitimate state interest".

STATEMENT OF THE CASE

In 1997 B.A.M. DEVELOPMENT, as owner of a 15-acre parcel located immediately adjacent to 3500 South Street---actually a "state highway" subject to the jurisdiction of the Utah Department of Transportation [UDOT]---applied to SALT LAKE COUNTY for development approval of the "Westridge Meadows" subdivision development. The proposed subdivision presented no unique or difficult geologic, topographic or similar engineering or other considerations. The proposed lot configuration and other improvements readily conformed to existing zoning requirements. What should have been a

---

[1]The COUNTY's evaluation of the case from page 3 of its OPENING BRIEF, namely, "This case involves claims [that] . . . the County violated BAM's constitutional guarantees of just compensation for "takings" of private property . . ." is much more accurately and fairly stated.

relatively simple administrative procedure requiring three or four months actually took two years (until August 1999) to complete.

In August 1998 the COUNTY Board of Commissioners summarily refused to hear B.A.M. DEVELOPMENT's appeal of County Planning and Zoning Commission's requirements---as per the COUNTY's "highway-abutting" Ordinance---that B.A.M. DEVELOPMENT, as a condition of development approval, dedicate and improve a 53-foot "half-width" of the 3500 South state highway. This litigation was filed in August 1998. In August 1999---one year AFTER the litigation was filed---the COUNTY finally granted development approval and required the dedication and installation of the roadway and other improvements to the 3500 South state highway, which previously had a "half-width" of asphalt for eastbound traffic of approximately 17 feet, with a then-current "traffic load" of slightly less than 13,000 vehicles per day (both directions). In addition to the "internal" improvements (interior streets, sidewalks, etc.) as regularly required for the building lots directly served by those public improvements, B.A.M. DEVELOPMENT installed the "excessive" improvements mandated by the COUNTY for the 3500 South state roadway.

The litigation was tried in the Third District Court in April 2001 before Judge Timothy R Hansen, who ruled in favor

of the COUNTY: to the effect that there was a "rational basis" for the COUNTY's dedication and improvement requirements. The judgment of the District Court was appealed to the Utah Supreme Court, which "poured over" the appeal to the Utah Court of Appeals. In October 2002 the Court of Appeals heard oral arguments and took the case "under advisement". In February 2004 the Court of Appeals issued its Decision, joined by a 2-member majority and with one Judge dissenting. The three judges, however, were unanimous in concluding that the so-called **Nollan-Dolan** standard was the correct analytical standard to be applied, thus overruling the District Court on that legal issue. However, the Court of Appeals majority---without the issue having been raised or briefed---sua sponte raised the "administrative remand" issue. B.A.M. DEVELOPMENT sought for a "petition for rehearing" on the "administrative remand" issue, but after full consideration of the "petition for rehearing" request, the "rehearing" was denied.

Thereafter, both parties filed cross-petitions for writ of certiorari. The cross-petitions were granted and the cases consolidated, with the Supreme Court specifying the three issues reserved for review.

SUMMARY OF B.A.M. DEVELOPMENT ARGUMENTS

Herein B.A.M. DEVELOPMENT asserts the following arguments, summarized thus:

1. The **Nollan-Dolan** standards of "essential nexus", "reasonable relationship", "individualized determination" and "rough proportionality" are, as a matter of federal constitutional law, directly and dispositively applicable to the excessive dedications and improvements identified in this litigation.

2. The excessive dedication and installed improvements for the 3500 South state roadway also violate the Utah "constitutional standard of reasonableness", as previously developed by the Utah Supreme Court in the **Banberry Development** (1981) decision interpreting the Utah Constitution.

3. The excessive dedications and installed improvements required by the COUNTY pursuant to the "highway-abutting" Ordinance also violate national and state constitutional law principles of "equal protection" and "uniform operation of laws".

4. The "administrative remand" provisions and disposition of the Utah Court of Appeals, raised sua sponte and without the benefit of any briefing, is improvident and misguided, and must be affirmatively addressed, overruled and clarified by the Supreme Court.

5. The provisions of Section 63-90a-4, Utah Code, expressly directing that no "administrative hearing" is needed as a pre-condition to bringing an "inverse

condemnation" claim for a "physical taking" or an "exaction by a political subdivision" is applicable and controlling: to override the "administrative remand" portions of the Court of Appeals Decision.

ARGUMENT

I

THE CONSTITUTIONAL PRINCIPLES EMBODIED IN THE DECISIONS OF THE UNITED STATE SUPREME COURT IN THE CASES OF NOLLAN VS CALIFORNIA COASTAL COMMISSION (1987) AND OF DOLAN VS CITY OF TIGARD (1994) AND THE DECISIONS OF THE UTAH SUPREME COURT IN THE CASES OF CALL VS CITY OF WEST JORDAN (1980) AND OF BANBERRY DEVELOPMENT VS SOUTH JORDAN CITY (1981) ARE APPLICABLE TO THE GEOGRAPHY-BASED "HIGHWAY-ABUTTING" ORDINANCE AND ENTITLE THE ADVERSELY AFFECTED DEVELOPER TO AN AWARD OF JUST COMPENSATION FOR SUCH EXCESSIVE DEDICATIONS AND EXACTIONS TAKEN FOR PUBLIC USE IN CONTRADICTION OF THOSE CONSTITUTIONAL PRINCIPLES

This is a case of "inverse condemnation" brought by a propertyowner [B.A.M. DEVELOPMENT] against a local government [SALT LAKE COUNTY] for excessive development "exactions": excessive real estate dedications AND required improvement of that real estate, beyond that "reasonably" required (created) by the development. The "taking" claims arise from the admitted, straight-up physical occupation of real estate AND from the required expenditure of private monies for the development of roadway-related improvements thereof. The "takings" claims of B.A.M. DEVELOPMENT are brought under the national Constitution and under the Constitution of the State of Utah.

A

THE NOLLAN-DOLAN STANDARDS OF "ESSENTIAL NEXUS", "REASONABLE RELATIONSHIP" "INDIVIDUALIZED DETERMINATION" AND "ROUGH PROPORTIONALITY" ARE DIRECTLY AND EXPRESSLY APPLICABLE TO THE "UNCONSTITUTIONAL TAKING" CLAIMS RAISED IN THIS "INVERSE CONDEMNATION" ACTION TO RECOVER JUST COMPENSATION FOR THE EXCESSIVE IN-KIND EXACTIONS ("PHYSICAL TAKINGS") EFFECTED PURSUANT TO THE COUNTY'S "HIGHWAY-ABUTTING" ORDINANCE

The decisions of the United States Supreme Court in the cases of **Nollan vs California Coastal Commission** 483 US 825, 97 LEd2d 677, 107 SCt 3141 (1987) [hereinafter "**Nollan**" and attached hereto at APPENDIX #2], and of **Dolan vs City of Tigard** (1994), 512 US 374, 129 Led2d 304, 114 Sct 2309 (1994), [hereinafter "**Dolan**" and attached hereto as APPENDIX #3], speak for themselves. The applicability of **Nollan** and **Dolan**---and the constitutional principles those decisions identify and require---will be readily apparent to the Court upon its reading thereof. The B.A.M. Development "Westridge Meadows" situation---and the applicability of **Nollan** and of **Dolan** thereto---is predicated upon a relatively-finite, small set of core facts, encapsulated in but two sentences, thus:

1. As a condition of development approval for a routine 44-lot residential subdivision and pursuant to the provisions of the "highway-abutting" Ordinance [hereinafter the "highway-

abutting" Ordinance][2], Defendant COUNTY required the Developer Plaintiff B.A.M. DEVELOPMENT to dedicate (fee simple conveyance effect) for permanent and irrevocable "public use" and to improve (as a "half-width" of a 7-lane highway) approximately 38,000 square feet of previously held "private property" to become public roadway within the 3500 South Street area and to undertake, at its own private expense, "improvements" (pavement, curbing, sidewalk, adjacent barrier fencing, storm-drain line upsizing, and power pole relocation).

---

[2]The "highway abutting" Ordinance---as codified within the County's ordinances and as included in the COUNTY's OPENING BRIEF [Appendix "2"]---provides:

> 15.28.010 **Dedication and improvement required.**
>
> Except as otherwise provided in Section 15.28.020, **no building or structure shall be erected,** reconstructed, structurally altered or enlarged, and no building permit shall be issued therefor, **on any lot or parcel which abuts a major or secondary highway,** as shown on the map entitled "The County Transportation Improvement Plan," on file with the planning and development services division and made part of this chapter by reference, **unless the portion of such lot or parcel within the right-of-way of the highway to be widened or additional required street width <u>has been dedicated to the county and improved</u>**. This dedication and improvements shall meet the standards for such highway or street improvement as provided in Section 15.28.060.

Emphasis added.

2. The "highway-abutting" dedication and improvement requirements of the COUNTY's Ordinance are enforced against ONLY those parcels which are "highway-abutting"; other developments, creating equal or even greater demands (i.e. "impact") for roadway improvement are exempt from the dedication and improvement requirements if they are not "highway-abutting".

The **Nollan-Dolan** analytical framework is relevant and applicable in adjudicating the case-at-hand, for at least the following reasons:

1. The **Nollan-Dolan** analytical framework presents a factual and legal setting which is, legally and constitutionally, essentially "on-all-fours" with the instant factual situation: the "ocean-abutting" easement at issue in **Nollan** and the "creek-abutting" easement at issue in **Dolan** are not materially distinguishable, in a constitutional sense, from the "highway-abutting" situation presented in the instant case.

2. The **Nollan-Dolan** analytical framework and result are applicable to the case-at-hand, because the "essential nexus" and "rough proportionality" standards are essentially the same constitutional standards as have been previously developed and

adopted by the Utah Supreme Court in the earlier cases of **Call vs City of West Jordan**, 606 P.2d 217 (Utah 1979), on rehearing 614 P.2d 1257 (Utah 1980) [holding the dedication must bear a "reasonable relationship to the needs created by the development"] and **Banberry Development Corporation vs South Jordan City**, 631 P.2d 899 (Utah 1981) [establishing the "constitutional standard of reasonableness" criteria for development exactions]. The decisions of the Utah Supreme Court in **Call II** and in **Banberry Development** are binding precedent and clearly establish the "state constitutional" basis and minimum threshold to which the COUNTY government must adhere.

3. There is nothing in the **Nollan** or the **Dolan** decisions which would support the COUNTY's self-serving claim that the **Nollan-Dolan** framework should not apply to the "highway abutting" Ordinance, and the exactions thereunder, whether or not legislatively or administratively imposed: the result upon the propertyowner is still the same. In fact, the "highway-abutting" Ordinance---with its result that the unfortunate few "highway-abutting" parcels are "singled out" and forced to

bear the entire burden, created by all developments, which burden should be borne by the public at large (or at least by those other developers contributing their share to that burden)---carries with it the **Nollan**-identified "heightened risk" that the "building prohibition" imposed only against "highway-abutting" parcels is merely an "out-and-out plan of extortion" [107 SCt at 3149] to obtain the sought-for "easement" without making the "just compensation" payment. That the "highway-abutting" Ordinance is so written and applied, so as to obtain real estate and improvements in contravention of the Just Compensation Clause, should be readily apparent to the Court.

B

THE EXACTIONS REQUIRED UNDER THE COUNTY'S "HIGHWAY-ABUTTING" ORDINANCE FAIL TO SATISFY THE CONSTITUTIONAL PRINCIPLES AND STANDARDS OF THE NOLLAN-DOLAN ANALYTICAL FRAMEWORK AND THE PROPERTYOWNER IS ENTITLED TO JUST COMPENSATION

The Just Compensation Clause---sometimes referred to as "the Takings Clause" or "the Property Clause"---of the Fifth Amendment to the national Constitution provides:

> **. . . private property shall not be taken for public use without just compensation; . . .**

In 1960 the United States Supreme Court in **Armstrong vs United States**, 364 US 40, 4 LEd2d 1554, 80 SCt 1563 (1960),

observed:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to **bar Government from forcing some people to bear public burdens which, in all fairness, should be borne by the public as a whole.**

364 US at 49, 80 SCt at 1569. Emphasis added.

In 1980 the United States Supreme Court, in its decision of in the case of **Webb's Fabulous Pharmacies, Incorporated vs Beckwith**, 449 US 155, 66 LEd2d 358, 101 SCt 446 (1980), had written:

> To put it another way: **a State, by ipse dixit, may not transform private property into public property without compensation**, even for the limited duration of the deposit in court. **This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.**

449 US at 164, 101 SCt at 452. Emphasis added.

In 1922 Justice Oliver Wendell Holmes Jr, writing the majority opinion in **Pennsylvania Coal Company vs Mahon**, 260 US 393, 67 LEd 322, 43 SCt 158 (1922), warned and observed:

> When th[e] **seemingly absolute protection** [of the Fifth and Fourteenth Amendments] is found to be qualified by the police power, **the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.**
> . . .
> . . . We are in danger of forgetting that **a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.**

260 US at 415-416. Emphasis added. Bracketed material added for clarity.

In 1992 the United States Supreme Court in **Lucas vs South Carolina Coastal Council**, 505 US 1003, 120 L.Ed 3d 798, 112 SCt 2886 (1992), wrote:

> "[A]t least **with regard to permanent invasions**, no matter how minute the intrusions, and no matter how weighty the public purpose behind it, **we have required compensation.**"

505 US at 1015, 112 SCt at 2893. Emphasis added.

In 2001 the United States Supreme Court again had opportunity to revisit the "Just Compensation Clause" in the case of **Palazzolo vs Rhode Island**, 533 US 606, 150 LEd2d 592, 121 SCt 2448 (2001), wherein the Court wrote:

> The **clearest sort of taking occurs when the government encroaches upon or occupies private land** for its own proposed use. **Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause.**

533 US at 617, 121 SCt at 2457. Emphasis added. Citation to cases omitted.

Although the federal "takings" jurisprudence has had a seemingly-convoluted history, in the spring of 1987 the United States Supreme Court issued two truly "landmark" decisions which had an explosive impact upon local governments nationwide. The first of these decisions---**First English Evangelical Lutheran Church of Glendale vs Los Angeles County**, 482 US 304, 107 SCt 2378 (1987), decided 9

June 1987---held that a county may be liable for a "taking" effected pursuant to temporary building moratorium imposed for public safety purpose]. The second "landmark" decision from 1987 was **Nollan vs California Coastal Commission**, 483 US 825, 97 LEd2d 677, 107 SCt 3141 (1987) [hereinafter referred to as "**Nollan**"], decided two weeks later. The majority opinion in **Nollan** is relatively short and to-the-point; the decision "speaks for itself". The Court will be familiar with its analytical method and conclusion.

In **Nollan** the governmental entity [the California Coastal Commission] had required, as a condition of development (demolition of an existing residential structure and replacement thereof with a larger residential structure) approval, that the propertyowner dedicate a "public easement" across privately-held beachfront property immediately adjacent to the Pacific Ocean. The United States Supreme Court analyzed that the required "easement" would be a "permanent physical occupation", 107 SCt at 3146, entitled to compensation, and wrote:

> Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, **the question becomes whether requiring it to be a conveyance as a condition for issuing a land-use permit alters the outcome.**

107 SCt at 3147. Emphasis added. The Court further observed:

> But **the right to build on one's own property---even though its exercise can be subjected to legitimate permitting requirements---cannot**

> **remotely be described as a "governmental benefit."** And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest **cannot be regarded as establishing a voluntary "exchange"** . . .

107 SCt at 3147. Footnote 2. Emphasis added. Citations to cases omitted.

The Supreme Court observed a factual setting which is exactly-on-point in the 3500 South Street dedication situation. The Supreme Court wrote:

> If the Nollans were being **singled out to bear the burden of California's attempt to remedy these problems**, although they had not contributed to it more than other coastal landowners, the State's actions, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. **One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."**

107 SCt at 3148. Footnote 4. Emphasis added. Citation to cases omitted.

After reviewing the previous history of the issue, the Supreme Court focused on the "imposition of the condition" (i.e. the mandated dedication of the easement to the government) in the context of the "development prohibition" (i.e. the exercise of the government's 'police power' to prohibit the development outright). The Court observed such a required "dedication" would be constitutional if it "serves the same end" as the prohibition. 107 SCt at 3148. The **Nollan** Court, however, went on to say:

> The evident constitutional propriety disappears, however, **if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation** . . . [lengthy discussion about prohibition against shouting fire in a theater, but authorized were a monetary fee paid to the State] . . . **would not pass constitutional muster.**

107 SCt at 3148-3149. Emphasis added. [Bracketed material added for clarity: please refer to original text.] The Court then continued:

> Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. **The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.** Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, **unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."**

107 SCt at 3149. Emphasis added. Citation to cases omitted.

The COUNTY argues [Page 19 of COUNTY's brief] that the "highway-abutting" Ordinance is needed to further "sensible long-range transportation planning". That claimed justification (i.e. "long-range . . . planning") is FUTURISTIC and ipso facto confirms the violation of the **Nollan-Dolan** standard, which requires a PRESENT impact and an "individualized determination" of that PRESENT impact. Thus, that sub-part of the "nexus" test fails. The COUNTY, on the basis of "long-range . . . planning" cannot justify

the PRESENT installation of the improvements for 3500 South. The "Achilles' heel" which the COUNTY self-servingly overlooks is the simple fact that there simply is NO "building restriction" which is uniformly imposed against ALL development which may be causing the traffic congestion. [See APPENDIX #7 showing the area location and the immediately adjoining developments: "Elusive Estates", "Chaparral" and "Centennial" subdivisions. Against those adjacent developments, which (on a "per lot" basis) arguably put an equal amount of traffic (vehicles per day) onto 3500 South Street, NO "exactions" (dedication or improvements) were required.] The "building restriction" selectively-imposed against ONLY the "highway-abutting" parcels, is---for these constitutional purposes---not a valid "permit condition"; the restriction is simply a pretext to avoid the Just Compensation Clause and for that reason there can be no "nexus" established. The COUNTY's "purpose" (of the "permit condition": dedication required) has been "converted" into "something other than what it was." Id. at 3149. Concerning the "purpose" (of the "permit condition": dedication required) the Supreme Court in **Nollan** continued:

> The **purpose then becomes**, quite simply, **the obtaining of an easement** to serve some valid governmental purpose, **but without payment of compensation.**

Id. at 3149. Emphasis added. The Ordinance fails the **Nollan** standard. The result of the Ordinance, with its "building

restriction" imposed, however, against ONLY "highway-abutting" parcels is readily observable to even the most casual observer. The Supreme Court in **Nollan** continued:

> We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes. **Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts.**

107 SCt at 3149-3150. Citations to numerous cases omitted. In that listing the Supreme Court cited to the decision of **Call vs West Jordan**, 614 P.2d 1257 (Utah 1980) ["**Call II**"]. The United States Supreme Court continued:

> **We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it more than an exercise in cleverness and imagination.** As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "substantial advancing" of a **legitimate** State interest. We are inclined to be particularly careful about the objective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is **a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.**

107 SCt at 3150-51. Emphasis added. In the instant setting, the "heightened risk" that the TRUE "purpose" behind the COUNTY's arbitrarily-applied "highway- abutting" dedication requirement (but non-existent "building ban") IS readily and unavoidably apparent and transparent: the "avoidance of the compensation requirement", as the foregoing text identifies.

The COUNTY's claim that the stated police power objective (of "long-range transportation planning" and acquiring right-of-way) is disingenuous, as well as being unconstitutionally applied. This is exactly the setting which is/creates "a heightened risk" that the development exaction (i.e. the roadway dedication and improvements) is for the "avoidance of the compensation requirement". Such is transparently clear from even the most casual reading of the COUNTY's "highway-abutting Ordinance". As the Supreme Court warned against, the COUNTY has---in disregard of the Court's mandate---engaged in the "exercise of cleverness and imagination"; that "cleverness and imagination" nevertheless does not satisfy the demands of the Constitution.

In examining the Coastal Commission's "comprehensive program"---which is, arguably, the functional equivalent to the COUNTY's assertedly "uniform and comprehensive plan" of requiring "highway-abutting" parcels to effect the dedication and improvements---the **Nollan** opinion concluded:

> . . . The Commission may well be right that **it is a good idea**, but that does not establish that the Nollans (and other coastal residents) **alone can be compelled do contribute to its realization.** Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose" see U.S. Const. Amdt. 5; **but if it wants an easement across Nollan's property, it must pay for it.**

107 SCt at 3151. Emphasis added. That constitutional principle and conclusion is self-evidently applicable to the

"highway-abutting" exaction requirements at issue here.

The **Nollan** decision would not have been materially different in its result had the California Legislature, by statute, declared that all owners of "ocean-abutting" parcels needing building permits are required to dedicate a "public easement" across their parcels at water's edge. **Nollan** was decided---and constitutes "the law of the land"---on the basis of substantive, "constitutional" principles, not on some procedural technicality (i.e. how the "taking" decision was made and/or by whom).

In **Dolan vs City of Tigard**, 512 US 374, 129 LEd2d 304, 114 SCt 2309 (1994), the United States Supreme Court had occasion to revisit and further explain the constitutional principles discussed in **Nollan** seven years earlier. In **Dolan** the propertyowner had sought development approval enlargement of an existing retail store upon property directly abutting "Fanno Creek". As a condition of development approval the municipality required the dedication of a "public easement" along the creek together with installation of a walkway and bicycle path within the dedicated easement. In **Dolan** the United States Supreme Court introduced the "takings" issue thus:

> We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n*, of <u>what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development</u>.

Id. at 377, 114 SCt at 2312. Emphasis added. Citation omitted.

The **Dolan** majority then proceeded to discuss the relevant "constitutional" issues, including a review of the pertinent case law "standards" (and phrasing of those "standards"), as developed by the state courts. The Supreme Court again cited to this Court's 1979 decision in the case of **Call vs West Jordan**, 606 P.2d 217 (Utah 1979), as "authority" for the "reasonable relationship" test, as adopted by the majority of state courts which had adopted judicial tests for exactions. The Supreme Court also described two other tests---a very "lax" standard followed by a couple states (Montana and New York) and the "specific and uniquely attributable" standard followed by Illinois. The Supreme Court observed that the great majority of state courts which had ruled on the issue followed the "reasonable relationship" standard. In holding against the municipality, the United States Supreme Court in **Dolan** wrote:

> One of the principal purposes of the Takings Clause is **"to bar Government from forcing some people to bear public burdens which, in all fairness, should be borne by the public as a whole."**
>
> . . .
>
> Under the well-settled doctrine of "unconstitutional conditions", **the government may not require a person to give up a constitutional right---here the right to receive just compensation when property is taken for public use**---in exchange for a discretionary benefit conferred by the government where the property has

little or no relationship to the benefit.

114 SCt at 2316-2317. Emphasis added.

In attempting to define the "degree of the exactions demanded by the city's permit conditions bears to the projected impact of petitioner's proposed development" [114 SCt at 2318], the Court, initially quoting a Nebraska Supreme Court decision, wrote:

> "The distinction, therefore, which must be made between an appropriate exercise of the police power and an **improper exercise of eminent domain** is **whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used** as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit."

Thus, the court held a city may not require a property owner to dedicate property for some future public use as a condition for obtaining a building permit when such future use is not "occasioned by the construction sought to be permitted."

Some form of the **reasonable relationship test** has been adopted in many other jurisdictions. [Citations to cases omitted.] Despite any **semantic differences**, general agreement exists among the courts "that **the dedication should have some reasonable relationship to the needs created by the [development]**."

We think the "reasonable relationship" test adopted by a majority of the states courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

We think a term such as **"rough**

> **proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment.** No precise mathematical calculation is required, but **the city must make some sort of individualized determination that the required dedication is** related both in nature and extent to the impact of the proposed development.

114 SCt at 2319-2320. Emphasis added. Citations to cases and other authorities---cited in original Supreme Court text---have been omitted.]

In response to "pre-trial discovery" requests, the COUNTY provided the "individualized determination" calculations, made in January 2001---almost THREE YEARS AFTER the COUNTY first imposed the exactions. The single-page, hand-written "individualized determination" document [attached hereto as APPENDIX #8] states, in its entirety:

> january 24 2001
> Bam Development EXHIBIT 11
> 822' frontage
>
> 1997 adt 3500 S 12910)
>) 4% increase
> 1998 " " 13385)
>
> 2015 adt projected 17000 vpd
> 2020 adt projected 23000 vpd
> if current 4% keeps up 2020 = 29000 vpd
> typically design for level of service C (LOS)
> development traffic 487 vpd
> current roadway = 3 lanes
> LOS D
> LOS E = 15952 vpd (3 lanes)
> LOS C = 29000 vpd (7 lanes)
>
> on cusp of failing--requires widening to 7 lanes by year 2020

The abbreviations "vpd" and "adt" apparently refer to "vehicles per day" and to "average daily trips" respectively. "LOS" refers to "level of service": a somewhat subjective determination as to the carrying capacity of the roadway, as characterized by waiting times. The FUTURISTIC analysis contained within the "individualized determination" underscores the COUNTY's failure to identify the PRESENT needs allegedly generated by the Westridge Meadows development. If the existing 17-foot roadway was at "level of service D", B.A.M. shouldn't have been required to construct the "half-width" to the "level of service C" standard, thus "remedying pre-existing deficiencies". If the 487 vehicles per day is compared against the existing (approximately) 13385 vehicles per day, on an "buy-in" basis, then approximately 1/25th of the existing "roadway" (i.e. paved asphalt) is needed: against the 17 feet of pre-existing asphalt, that's another seven or eight inches, but that's all. If the 487 vehicles generated by Westridge Meadows is compared against the 27,000 vehicles per day of the 7-lane roadway after full installation (i.e. B.A.M.'s "half-width"), as calculated to be needed in "year 2020", for which B.A.M. was PRESENTLY required to build the "eastbound half-width", the "Westridge" share is 487/27000, or about 1/55ths: 1.8 percent. B.A.M. DEVELOPMENT ought to be paying 1.8% of the 3500 South improvement costs. Having

paid 100% of the costs, B.A.M. DEVELOPMENT "overpaid" by approximately 55 TIMES TOO MUCH; such is hardly "roughly proportional". The COUNTY fails another element of **Dolan**.

The COUNTY asserts [p. 34 of its OPENING BRIEF] that **Nollan** and **Dolan** are two "discrete", separate "analytical models" which can be "readily separated". The COUNTY's self-serving analysis and statement are obviously incorrect and misguided. **Nollan** and **Dolan** are expressly and logically intertwined: the two decisions represent the Supreme Court's identification and application of constitutional principles which are applicable in the case-at-hand. As can be seen, the two decisions must obviously be read together. As is readily apparent **Dolan** constitutes the Court's more-recent pronouncement and continuing development of the long-line of cases, for which **Nollan** was merely the culminating (i.e. "landmark") decision most clearly and decidedly bringing the constitutional principles into focus. As such, **Nollan** and **Dolan** are essentially inseparable; the two decisions must, as intended, be read together. In the same vein, the local government---the COUNTY---must satisfy the stated "constitutional" restrictions and prerequisites specified in BOTH decisions. Satisfaction of one element---the COUNTY incorrectly asserts that the **Nollan** "nexus" test was satisfied and thus **Dolan** doesn't even apply, with the result that the COUNTY goes free---is not enough: the COUNTY must

satisfy ALL the criteria of the 4-element **Nollan-Dolan** standard.

Correctly understood, the legislatively-determined, geography-based exaction imposed pursuant to the COUNTY Ordinance---with seeming (i.e. claimed) no administrative discretion allowed for site-specific issues or impacts---fails the **Nollan-Dolan** test:

1. There is no "essential nexus" and certainly no "legitimate" governmental purpose (in evading the Just Compensation Clause).

2. There is no meaningful or relevant "individualized determination" that the exactions required of B.A.M. were related in "nature and extent" between the conditions and the impact. There was (and continues to be, under the "highway-abutting" Ordinance, for which---the COUNTY claims---no discretion is allowed) no "quantification" of findings.

3. There is (was and has been) no demonstration of "rough proportionality".[3] This is particularly

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[3]The January 2001 calculations made the COUNTY on the eve of trial and only in response to the Plaintiff's pre-trial discovery request, fail to satisfy the "individualized determination" requirement. First, such was not done at the time (i.e. BEFORE) the dedication, as **Dolan** requires. Secondly, because the actual calculations---which are actually more estimates of the future roadway capacity for decades into the future---are not "individualized" for the Westridge Meadows subdivision (44 lots).

> critical, given the fact that **Dolan** imposes upon the local government the "burden" of establishing the constitutionality of the dedication requirement, in context of the "rough proportionality" of the "taking"!

On that basis, it is readily apparent that Plaintiff's assertion---but not necessarily Plaintiff's allegation---that the COUNTY's "dedication" requirement, if not the Ordinance in particular---was "facially" unconstitutional was and is directly on point.

If the "Elusive Estates" subdivision, a couple hundred feet further to the south and which paid no "de facto impact fee" because that development did not "abut" onto 3500 South Street, is considered, B.A.M. DEVELOPMENT paid a "de facto traffic impact fee" INFINITELY TIMES MORE than the similarly-situated "Elusive Estates" subdivision "didn't pay".

The applicability of the **Nollan-Dolan** framework was correctly recognized and properly accepted by all three judges of the Court of Appeals in the Decision. [In contrast, hardly any of the argument and none of the obviously-inapplicable case-law "authority" cited by the COUNTY to the contrary was accepted by the Court of Appeals.] In light of the foregoing analysis, the dedication and improvement exactions required under the COUNTY's

"highway-abutting" Ordinance fail under the **Nollan-Dolan** analytical framework. The propertyowner is entitled to just compensation. The Court of Appeals Decision recognizing the applicability of the **Nollan-Dolan** standard should be upheld.

C

THE "ESSENTIAL NEXUS" AND "ROUGH PROPORTIONALITY" STANDARDS OF NOLLAN-DOLAN FRAMEWORK ARE THE FUNCTIONAL EQUIVALENT OF THE UTAH "CONSTITUTIONAL STANDARD OF REASONABLENESS" AS DEVELOPED BY THE UTAH SUPREME COURT

In addition to approaching and deciding the case on "national" constitutional grounds (ala **Nollan-Dolan**), the Court is requested to examine the claims on independent "state" constitutional grounds.[4] Cross-Petitioner B.A.M. DEVELOPMENT asserts that these "state" standards are

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[4]The Supreme Court is requested to examine and concurrently decide this case on "independent state constitutional grounds", aside from and outside of the **Nollan-Dolan** framework. This jurisprudential approach, sometimes called "primacy", was identified---if not developed---by scholarly jurists, regionally including Associate Justice Hans A Linde of the Oregon Supreme Court. See Linde, "First Things First: Rediscovering the States' Bills of Rights", 9 University of Baltimore Law Review 379, (1980). See also Carson, "Last Things Last: A Methodological Approach to Legal Arguments in State Courts", 19 Willamette Law Review 641 (1983), as prepared by Associate Justice Wallace P Carson Jr of the Oregon Supreme Court.

In years past individual members of this Court---in judicial decisions and/or in public forums---have invited and suggested practitioners assert "independent state constitutional grounds" as a basis for judicial relief. The instant case represents such an opportunity, in which governmental interests clash with constitutionally-guaranteed "individual" rights (ala to receive "just compensation" for "private property taken for public use").

functionally equivalent to the "national" standard [of **Nollan-Dolan]**, although their application may perhaps result in an differing result. [For example, even if **Nollan-Dolan** were found to be inapplicable, the "state" standards might still justify an award of "just compensation" to the propertyowner.] However, this Court may view the well-developed body of "Utah constitutional law" on this subject to be different from the national standard. If so, then the suggestion (by the COUNTY) that the Court examine only the national standard should not be followed; on the contrary, the Court is requested to adjudicate all claims---national and state---each of which have been pleaded and litigated from the very inception of this litigation.

The "Just Compensation Clause" of the Utah Constitution is found in Article I, Section 22, which provides:

> **Private property shall not be taken** or damaged **for public use without just compensation.**

Emphasis added.

Utah case law decisions, interpreting and applying the Just Compensation Clause of the Utah Constitution, are equally explicit and consistent in awarding compensation. See, for example, **Three D Corporation vs Salt Lake City**, 752 P.2d 1321 (Utah App. 1988) [propertyowner entitled to compensation when municipality installed curb which interfered with access and parking on parcel, even though no property was actually "taken" by government]; **Hampton vs**

State Road Commission, 21 Utah 2d 342, 445 P.2d 708 (1968) [compensable taking occurred when Road Commission substantially interfered with owners only means of ingress and egress (private driveway), even though there was no actual taking of propertyowners real property][5]; and **Utah State Road Commission vs Miya**, 526 P.2d 926 (Utah 1974) [compensable taking occurred when government constructed viaduct obstructing owner's view, thus decreasing property value, and which interfered with privacy].

In 1979 the Utah Supreme Court rendered its decision in the case of **Call vs City of West Jordan**, 606 P.2d 187 (Utah 1979) [hereinafter "**Call I**"], on rehearing 614 P.2d 1280 (Utah 1980) [hereinafter "**Call II**"]. In **Call I** the Utah Supreme Court was faced with and resolved a situation which was to become---perhaps not a "landmark" decision---but certainly at the time one of but a literal "handful" of cases which at that time had addressed the issues of development exactions and impact fees, as quoted by the United States Supreme Court in **Nollan** in 1987 and thereafter in **Dolan** in 1994. In **Call I** the subdivision developer had

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[5]The COUNTY will undoubtedly assert that the propertyowners of the lots across the northern end of Westridge Meadows have "public street" access by the street frontage to the south. Thus, the impassible fencing adjacent to 3500 South Street does not raise **Three D**-type or **Hampton**-type issues. Arguably so, but the flip-side to that argument is the fact then that the 3500 South fencing (and the other roadway improvements) should not have been required at all. The COUNTY loses.

challenged the in-kind exaction (i.e. dedication of real estate) and the in-lieu-of "impact fee". The **Call I** Court---upholding the validity of the dedication ordinance---wrote:

> . . . the ordinance **should be applied fairly, and without favoritism or discrimination**

606 P.2d 221. In **Call I** the unconstitutionality of the municipal ordinance was not specifically alleged by the challengers. Consequently, as a matter of "constitutional law", **Call I** is essentially void of any "constitutional" reference. On "petition for rehearing", the Court wrote:

> the dedication should have **some reasonable relationship to the need created by the subdivision.**

Call II. 614 P.2d at 1258. Emphasis added. Citations to footnotes omitted.

Any jurisprudential narrowness in the **Call I** and the **Call II** decisions from a "constitutional" sense was brushed aside by the opinion of the Supreme Court in **Banberry Development Corporation vs South Jordan City,** 631 P.2d 899 (Utah 1981) [hereinafter "**Banberry Development**"] decided a year later. [**Banberry Development** is contained herein as APPENDIX #4 to this OPENING BRIEF.] In **Banberry Development** the Utah Supreme Court, referring to an earlier Utah Supreme Court decision and quoting a decision of the Missouri Supreme Court, wrote:

> . . . if the burden cast upon the subdivider is **reasonably attributable to his activity**, then the requirement [of dedication or fees in lieu

> thereof] is permissible; if not, it is forbidden and amounts to **a confiscation of private property in contravention of the constitutional prohibitions** rather than reasonable regulation under the police power.

631 P.2d at 905. Emphasis added. Bracketed material in original text. In **Banberry Development** the Utah Supreme Court identified and described "**the constitutional standard of reasonableness**" [531 P.2d at 904.] applicable to the situation (i.e. "the validity of subdivision charges"). The **Banberry Development** opinion noted that the impact fee should "**fall equitably** upon those **who are similarly situated**" [631 P.2d at 905. Emphasis added.] and that between various developers contributing to development needs, the exactions must be imposed in an "equality of treatment" manner [631 P.2d 904]. The **Banberry Development** opinion also noted that "[t]he 'fair contribution' of the connecting party should not exceed 'the expense thereof met by others' [631 P.2d at 903] and that to comply with the standard of "reasonableness" the fees and dedications must

> ". . . **not require newly developed properties to bear more than their equitable share of the capital costs** in relation to benefits conferred".

631 P.2d at 903. Emphasis added. Accord, **Home Builders Association vs City of American Fork**, 1999 UT 7, 973 P.2d 425 (Utah Supreme Court 1999), ¶14. As previously noted, B.A.M. DEVELOPMENT was required to pay 55 TIMES more than its "share of the capital costs"; such is hardly "equitable"

or "reasonable". In **Banberry** the Supreme Court also noted:

> **Reasonableness** obviously holds the municipality to **a higher standard of rationality than the requirement that its actions not be arbitrary or capricious**.

631 P.2d at 905. Emphasis added. Citations to cases omitted.

The COUNTY's geography-based dedication requirement---imposed against Westridge Meadows but not imposed at all against the nearby Elusive Estates, Chaparral and Centennial subdivisions or any of the other "similarly-situated" residential subdivisions which were not "highway-abutting"---hardly qualifies under the "constitutional standard of reasonableness" or under the mandatory "equality of treatment" standard, which the Court said "must be done". 631 P.2d at 904. It is readily apparent that the provisions and application of the COUNTY's "highway-abutting" Ordinance fail the **Banberry Development** "constitutional standard of reasonableness" test.

D

THE COUNTY'S DEDICATION AND IMPROVEMENT REQUIREMENTS EFFECTED PURSUANT TO THE "HIGHWAY-ABUTTING" ORDINANCE ARE NOT A "UNIFORM" LAND-USE SCHEME, BUT VIOLATE "EQUAL PROTECTION" AND "UNIFORM OPERATION OF LAW" PRINCIPLES

The COUNTY mischaracterizes the "highway-abutting" Ordinance as being "uniform" and the exactions derived therefrom as not being "site-specific". Such could not be further from the truth! The "highway-abutting" Ordinance is far from "uniform" in its sweep, application and

justification. Similarly, its dedication and improvement requirements are extremely "site-specific": namely, those parcels which are "highway-abutting" are "extorted" (**Nollan** term) into dedicating and improving the roadway. The "building restriction" contained within the Ordinance is not applied in a "uniform" manner against all developers and builders which ostensibly create the demand (impact) for additional roadways; the "building restriction" is applied against ONLY "highway-abutting" parcels, and only for the most transparent of purposes: a pretext to evade the Just Compensation Clause requirements. A "building restriction" (or ban) might be justified if there were inadequate roadway infrastructure in the area and the "restriction" were applied "uniformly": that is, nobody gets to build unless and until government improves the roadway situation, or everyone does their fair share. That's not the case here.

The Section 1 of the Equal Protection Clause of the Fourteenth Amendment provides, in relevant part:

> . . . **nor shall any State deprive any person of** life, liberty, or **property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

Emphasis added.

Article I, Section 24, of the Utah Constitution provides:

> "All laws of a general nature shall have **uniform operation."**

Emphasis added.

In **Liedtke vs Schettler**, 649 P.2d 80 (Utah 1982), the Utah Supreme Court stated that Article I, §24 is "generally considered the equivalent of the Equal Protection Clause of the 14th Amendment, U.S. Constitution." 649 P.2d at 81 n.1. Although their language is dissimilar, Article I, §24 and the Equal Protection Clause embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same.

In **Leetham vs McGinn**, 524 P.2d 323 (Utah 1974), the Utah Supreme Court stated:

> A legislative classification is never arbitrary or unreasonable so long as the basis for differentiation bears a reasonable relation to the purposes or objectives to be accomplished by the act. **If some persons or transactions, excluded from the operation of the law, were it to the subject matter of the law in no differentiable class from those included within its operation, the law is discriminatory in the sense of being arbitrary and unconstitutional.**

524 P.2d at 325. Emphasis added. Citation to footnotes omitted.

In **Malan vs Lewis**, 693 P.2d 661 (Utah Supreme Court 1984), the Utah Supreme Court---invalidating the Utah "automobile guest statute"---illuminated and articulated the purposes and application of the "uniform operation of laws" and the "equal protection" provisions of the constitutions. The Court wrote:

> Whether a statute meets equal protection

> standards depends in the first instance upon the objectives of the statute and **whether the classifications established provide a reasonable basis for promoting those objectives**.
>
> . . .
>
> Article 1, §24 protects against two types of discrimination. First, a law must apply equally to all persons within a class. Second, **the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. If the relationship of the classification to the statutory objectives is unreasonable or fanciful, the discrimination is unreasonable.** Equal protection of the law, both state and federal, "requires more of a state law than nondiscriminatory application within the class it establishes . " The classification must rest upon some difference which "'**bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis . . . . [A]rbitrary selection can never be justified by calling it classification."** "The Courts must reach and determine the question whether the classifications drawn in a statute **are reasonable in light of its purpose**. The law under Article I, §24 is not different.

693 P.2d at 670-72. Emphasis added. Citations to cases and footnotes omitted.

In **Malan** the Utah Supreme Court continued:

> For a law to be constitutional under Article I, section 24, it is not enough that it be uniform on its face. **What is critical is that the operation of the law be uniform. A law does not operate uniformly if "persons similarly situated are not "treated similarly" or if "persons in different circumstances" are "treated as if their circumstances were the same."**

693 P.2d at 669 (Utah 1984). Emphasis added.

In the instant situation, the "highway-abutting" Ordinance is not "uniform" in its operation: the developer

of the Elusive Meadows subdivision, creating the "exact same impact" (sic) as the B.A.M. development of Westridge Meadows, is required to dedicate or improve nothing! The law simply is not uniform in its operation, although "facially" it may appear to be so. The "highway-abutting" criteria is itself its fatal "Achilles' heel".

In **Malan** the Supreme Court stated that Article I, Section 24 requires that a law must apply equally to all persons within a class and that statutory classifications must have a "reasonable tendency to further the objectives of the statute." 693 P.2d at 670. In the instant situation, the only "objective" which can be identified and advanced in furtherance of the COUNTY's policy of requiring the coerced "dedication" and improvement to the 53-foot "half-width" is to avoid the payment of the "just compensation" required by the constitutions. [If the "highway-abutting Ordinance" had as its "objective" the enhanced traffic flow, and so forth, on the roadways, then the "building restriction" would be enforced against ALL developers. That's not the situation here.] The required dedication/improvement, required from B.A.M. DEVELOPMENT when the similarly-situated, "side-by-side" developer of "Elusive Meadows" immediately to the south PAYS NOTHING, is not the "uniform operation" the Constitution requires! The "abutting-highway" criterion for the "classification" is a blatant, straight-forward attempt

to avoid the constitutional requirement of paying for the "taking"!

In **State Tax Commission vs Department of Finance**, 576 P.2d 1297 (Utah 1978), the Utah Supreme Court stated:

> Equal protection protects against discrimination within a class. The legislature has considerable discretion in the designation of classifications but **the court must determine whether such classifications operate equally on all persons similarly situated.**
>
> Thus, **whether a classification operates uniformly on all persons situated within constitutional parameters is an issue that must ultimately be decided by the judiciary.**

576 P.2d at 1298. Emphasis added.

The "highway-abutting" Ordinance is no more "uniform" in its operation than a statute which, hypothetically, singled out for income tax payment ONLY those citizens having naturally-occurring "red hair": those citizens with "red hair" had to pay income taxes and those not having "red hair" did not. Such a legislative scheme could not be successfully defended against "uniform operation of law" or "equal protection" attack by the government's assertion that the classification is "legislatively adopted", that it advances a legitimate governmental interest (i.e. government needs the money), and/or that it is "uniformly applied" (i.e. within and against all taxpayers having "red hair"). The same result occurs in the "highway-abutting" Ordinance which "singles out" a small class of developers and forces them to make dedications and incur improvement expenses for

costs which should be borne by the public at large.

The COUNTY asserts [p. 29 of its OPENING BRIEF, Footnote #18] that

> "**BAM's remedy** for what it perceives as unfair County subdivision development conditions (if any remedy is appropriate) **is a legislative remedy, not a judicial one.**"

Emphasis added. Such is an incredible statement. To think that B.A.M. DEVELOPMENT has any political or legislative influence with the COUNTY's governing body---which adopted the "highway-abutting" Ordinance in the first instance and which financially "gains" each time the Ordinance is enforced against a propertyowner unlucky enough to want to develop "highway-abutting" property---is unreasonable and unrealistic: so much so as to border on the absurd. It is against that type of self-serving governmental arrogance and constitutional insensitivity that B.A.M. DEVELOPMENT has filed for "judicial" remedy: the Court should expressly address this sub-issue. See **Tax Commission** [it is a judicial---not legislative---determination whether the classification operates "uniformly"] and **Malan** [courts must determine if the classification operates uniformly].

The COUNTY previously argued at trial that B.A.M. DEVELOPMENT, having acquired the real estate for development ostensibly knowing about the "highway-abutting" requirements, should be deemed to have waived all claims against enforcement of the Ordinance. To this type of

argument the Supreme Court in **Nollan** responded:

> **Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy.** So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property right in conveying the lot.

483 US at 833, 107 SCt at 3147. Footnote 2. Emphasis added. This same issue was also expressly revisited and similarly decided, even more expressly so, in **Palazzolo vs Rhode Island**, 533 US 606, 150 LEd2d 592, 121 SCt 2448 (2001).

The COUNTY characterizes the "dissenting" opinion of Judge ORME as being "lengthy and vociferous" [COUNTY Opening Brief, page 34]. Judge ORME's well-reasoned and scholarly opinion---even if in "dissent" on the "administrative remand" issue---is anything but "vociferous". Those portions of the dissenting opinion of Judge ORME dealing with the applicability of the **Nollan-Dolan** framework represent and constitute an extraordinary judicial and scholarly effort (successfully so in result) to identify the correct analytical framework for the case. [Except for the "administrative remand" issue---which the COUNTY concedes NOW was incorrectly approached and decided by the other two judges of the Court of Appeals panel, the Court of Appeals unanimously found **Nollan-Dolan** to be THE analytical standard for disposition of this case.] One cannot wonder that given the time the Court of Appeals took---namely, sixteen months

following "oral argument" (October 2002) to issuance of its opinion in February 2004---and the extraordinary research and scholarliness exhibited by Judge ORME---citing to cases and other authorities not even briefed by the parties---that the Judge ORME opinion was intended to be the "lead opinion" and it was through some quirk of fate that the other two judges fixated---improperly so, as the COUNTY implicitly now concedes---on the unraised, unbriefed and unpresented "administrative remand" issue, identified and raised sua sponte by the two-judge majority notwithstanding the COUNTY's position that the correct "appeal" procedures had been followed. See ORME, dissenting, ¶19 of the Decision.]

Judge ORME of the Court of Appeals---albeit in dissent to the 2-judge majority---"nailed it"! The Utah Supreme Court would be prudent to follow Judge ORME's well-reasoned "dissenting" opinion.

II

SECTION 63-90a-4, EXPRESSLY APPLICABLE TO JUDICIAL CASES INVOLVING "PHYSICAL TAKINGS" OR "EXACTIONS BY A POLITICAL SUBDIVISION", CREATES AND CONSTITUTES AN EXCEPTION TO THE ADMINISTRATIVE HEARING/ADMINISTRATIVE RECORD ISSUE

In discussing Issue #3 [applicability of Section 63-90a-4, Utah Code], the COUNTY essentially and expressly concedes that Section 63-90a-4 creates an exception to the "administrative hearing" requirements, as a pre-condition to filing an action for "physical takings" (statutory term)

cases. That's exactly correct; see analysis and discussion herein at Point III, below.

The COUNTY, however, does not go so far as conceding---which logically it should---that the obvious statutory and legal effect of the provisions of Section 63-90a-4 is to emasculate the "administrative remand" provisions [Issue #2] of the Court of Appeals' Decision, which the COUNTY inexplicably seems to continue to champion.

If Section 63-90a-4 creates and constitutes the "exception" so noted by the COUNTY, then there can be no "administrative record" (for the District Court to review), because there was no "administrative appeal hearing" held. Thus, the Court of Appeals Decision---in concluding that Section 17-27-1001 required the "administrative remand"---was improvident and uninformed. The Supreme Court should affirmatively and authoritatively decide and declare this issue---at least within the narrow exception for "physical takings" or "exactions by a political subdivision" (statutory terms) cases such as this---lest citizens, practitioners, subordinate courts and others observe (incorrectly) that the Court of Appeals' Decision concerning the "administrative remand" was correct---which it wasn't.

In related context, governmental authorities may not burden property by the imposition of repetitive or unfair land-use procedures in order to avoid a final decision. See

City of Monterey vs Del Monte Dunes at Monterey, Ltd., 526 US 687, 143 LEd2d 882, 119 SCt 1624 (1999) [upholding jury verdict against government]. See also **Palazollo**, supra.

III

SECTION 63-90a-4, UTAH CODE, IS APPLICABLE TO EXEMPT CREATION OF AN ADMINISTRATIVE RECORD TO BE REVIEWED BY THE DISTRICT COURT IN A "PHYSICAL TAKING" OR "EXACTIONS" CASE

Notwithstanding the COUNTY's earlier (and inconsistent with its present) assertions[6], the COUNTY now concedes the applicability of Section 63-90a-4, Utah Code, to the present situation. The COUNTY acknowledges that Section 63-90a-4 creates an "exception" to the "administrative remand"

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[6]See, for example, COUNTY's RESPONSE BRIEF TO APPELLANT'S PETITION FOR CERTIORARI, pp. 7-8 thereof, in which the COUNTY stated:

> Second, even if considered on the merits, **Sec. 63-90a-4 is wholly inapplicable in the context of this case.** . . . While Sec. 63-90a-4 allows a citizen to seek judicial relief while bypassing the municipal takings relief review provided as an option by the statute, this does not place the statute in conflict, or---as BAM suggests---in a "controlling" position relative to Sec. 17-27-1001 as interpreted by the Court of Appeals. . . . Consequently, **there is actually no "conflict" at all between Sec. 63-90a-4, and the interpretation of Sec. 17-27-1001 given by the Court of Appeals.**

Emphasis added.

NOW---after the Supreme Court has "certified" the issue for review---the COUNTY has flip-flopped and "changed its tune": the COUNTY concedes the applicability and "controlling" effect of Section 63-90a-4. The COUNTY's present language is:

> However, if considered on the merits, **it appears that Sec. 63-90a-4 is applicable** in the context of this case.

OPENING BRIEF, page 39. Emphasis added.

provisions (ostensibly required under the Court of Appeals' Decision) for those "physical takings" or "exactions by a political subdivision" (i.e. inverse condemnation) claims. [The COUNTY's conceding of this Issue #3 should, logically by extension, simultaneously concede---although the COUNTY doesn't expressly say so---the "administrative remand" [Issue #2] discussed above. The COUNTY's continuing arguments with respect to Issue #2 make no logical or judicial sense: if Section 63-90a-4 is controlling and dispositive, then the "administrative remand" provisions of the Decision are moot. It does no good and makes no sense to continue to belabor those provisions.]

The "administrative remand" (Issue #2) is directly and definitively controlled by the provisions of Section 63-90a-4, Utah Code, which provides:

> (2)(a)(i) **Any owner of private property whose interest is subject to a physical taking or exaction by a political subdivision may** appeal the political subdivision's decision within 30 days after the decision is made.
> . . .
> (b) **The private property owner need not file the appeal authorized by this section before bringing an action in any court to adjudicate claims that are eligible for appeal.**
> (c) **A property owner's failure to appeal the action of a political subdivision does not constitute, and may not be interpreted as constituting, a failure to exhaust available administrative remedies or as a bar to bringing legal action.**

Emphasis added. The complete text of Section 63-90a-1 et seq, Utah Code, is included as APPENDIX #6 to this OPENING

BRIEF.

The Court of Appeals Decision---disposing of the appeal on the basis of the "lack of administrative record" issue, which issue was not raised by the pleadings, was not tried in the District Court, and was neither briefed nor argued on appeal---overlooked the provisions of Section 63-90a-4. Even when the obvious applicability of Section 63-90a-4 was brought to the Court of Appeals' attention (in the context of the "petition for rehearing"), the Court of Appeals ultimately declined to consider the same. Section 63-90a-4 has controlling and dispositive significance---not necessarily in a procedural setting, but as a matter of substantive law---to the issues-at-hand.

The COUNTY's statements that Section 63-90a-4 was raised for the first time on appeal, is exactly correct; however, the COUNTY's citation of **DeBry vs Noble**, 889 P.2d 428 at 444 (Utah 1995) to the apparent result that the statute (issue) did NOT arise by reason of the Court of Appeals Decision is disingenuous and intentionally misleading to the Supreme Court. The quoted text from **DeBry**, although correctly quoted, impliedly asserts that the applicability of Section 63-90a-4 was NOT the result of the Court of Appeals Decision. That is misleading and inaccurate. The entire "administrative remand" issue was never raised by the COUNTY, in its pleadings or at trial, or

on appeal. The "administrative remand" issue only existed, as a result of the Court of Appeals Decision, which sua sponte identified and developed the "administrative remand" issue. So, of course, the applicability of Section 63-90a-4---which the Court of Appeals did not consider---became an issue, because Section 63-90a-4 is apparently so "controlling" and renders the Decision---at least ¶¶6 through 13 of the Decision---incorrect. The Supreme Court should "fix" that problem. The "specific" statutory provisions of Section 63-90a-4 being facially "directly on point" with the "physical taking" and "exactions by a political subdivision" claims-at-hand would seem to be controlling over the more "general" statutory provisions of Section 17-27-1001 the Decision has construed to be dispositive. See **Millett vs Clark Clinic Corporation**, 609 P.2d 934 (Utah Supreme Court 1980), wherein the Court wrote:

> **[W]here the operation of two statutory provisions is in conflict, that provision which is more specific** in its application **will govern over** that which is more **general**.

609 P.2d at 936. Emphasis added. Obviously, Section 63-90a-4 is exactly on-point and is exactly descriptive of what is to happen (or not happen: no request for hearing is required, as a condition precedent to a judicial action involving a "physical taking" or an "exaction"). The provisions of Section 17-27-1001 are certainly more "general" in nature. Thus, Section 63-90a-4 is controlling and dispositive.

The provisions of Section 17-27-1001 were originally adopted in 1991 but became first effective in 1992. Except for a minor stylistic change made in 1996---which is of no concern to us here---the provisions of Section 17-27-1001 have remained unchanged since 1992 (at least up to the time---1998---when this case began). The provisions of Section 63-90a-4 were originally adopted in 1994. In 1998 the provisions of Subsections 63-90a-4(b) and 63-90a-4(c)---the very provisions of the statute which are material to this issue and its dispositive applicability---were adopted: to provide the very text (i.e. no hearing need be requested or held) within the statute. It is a black-letter principle of statutory interpretation that where there is an irreconcilable conflict between new provisions and prior statutes relating to the same subject matter, the new provision is deemed controlling as it is the later expression of the Legislature. See **Ellis vs Utah State Retirement Board**, 757 P.2d 882 (Utah Court of Appeals 1988), certiorari granted 765 P.2d 1277, affirmed 783 P.2d 540 (Utah Supreme Court 1988). See also **S.S. vs State,** 972 P.2d 439. (Utah 1998) [recently enacted statute will supersede an existing statute] and **Murray City vs Hall**, 663 P.2d 1314 (Utah 1983) [same].

CONCLUSION

The **Nollan-Dolan** analytical framework is directly and authoritatively applicable to this "physical takings" case. The "highway-abutting" Ordinance fails in the **Nollan-Dolan** analysis, in all elements of the 4-element test. Furthermore, the COUNTY likewise failed in its "burden of proof" (under the federal standard of **Dolan**) to show that the dedication and improvement of the 3500 South roadway was "roughly proportional" in "scope and nature" to the needs created by the Westridge Meadows development of the 44 building lots. The Supreme Court should affirmatively and authoritatively address and adjudicate the **Nollan-Dolan** issue and the COUNTY's failure thereunder.

The Court should ALSO separately adjudicate and rule upon B.A.M. DEVELOPMENT's claims under the UTAH Constitution: the "constitutional standard of reasonableness" (per **Banberry**), as "independent state constitutional grounds", regardless of the Court's adjudication of the **Nollan-Dolan** issues.

If appropriate, the Court should declare the "highway-abutting" Ordinance unconstitutional, facially and/or as applied (it doesn't really matter), for any or all the foregoing reasons: violation of national Constitution (Just Compensation Clause and/or Equal Protection Clause) and/or violation of Utah Constitution (Just Compensation Clause,

"uniform operation of laws" clause).

The Court should overturn the Court of Appeals Decision on the "administrative remand" issue, as being improvidently arrived at---particularly in face of the obvious applicability of Section 63-90a-4, Utah Code.

The Court should remand the case to the District Court for entry of judgment in favor of Cross-Petitioner B.A.M. DEVELOPMENT and against the COUNTY on B.A.M.'s "physical taking" and "exaction by a political subdivision" ("inverse condemnation") claims (national and state) and related issues, as prayed and established at trial.

Respectfully submitted this 23rd day of December, 2004.

STEPHEN G HOMER
Attorney for Cross-Petitioner
B.A.M. DEVELOPMENT, L.L.C.

CERTIFICATE OF DELIVERY

I certify that I caused two copies of the foregoing OPENING BRIEF OF CROSS-PETITIONER B.A.M. DEVELOPMENT to be hand-delivered and/or mailed, first-class postage prepaid, to the office of Mr Donald H Hansen, Deputy Salt Lake County District Attorney, S-3400 Salt Lake County Government Center, 2001 South State Street, Salt Lake City, Utah 84190, this 23rd day of December, 2004.

APPENDICES

#1
B.A.M. Development vs Salt Lake County
87 P.3d 710 (Utah Court of Appeals 2004)

#2
Nollan vs California Coastal Commission
107 SCt 3141 (United States Supreme Court 1987)

#3
Dolan vs City of Tigard
114 SCt 2309 (United States Supreme Court 1994)

#4
Banberry Development Corporation vs South Jordan City
631 P.2d 899 (Utah Supreme Court 1981)

#5
SALT LAKE COUNTY "highway-abutting" Ordinance

#6
Section 63-90a-1 et seq, Utah Code

#7
"Westridge Meadows" subdivision area map

#8
COUNTY "Individualized Determination" document

2004 UT App 34

B.A.M. DEVELOPMENT, L.L.C., a Utah limited liability company, Plaintiff and Appellant,

v.

SALT LAKE COUNTY, a Utah body politic and political subdivision of the State of Utah, Defendant and Appellee.

No. 20010840–CA.

Court of Appeals of Utah.

Feb. 20, 2004.

Rehearing Denied April 8, 2004.

Background: Developer sought license to develop subdivision, and county zoning and planning commission granted preliminary approval after developer agreed to dedicated certain portion of the property for future road widening. Subsequently, however, board requested additional dedication of land, and, upon developer's objection to increase, denied its license application without receiving any evidence. Developer appealed to board of commissioners, claiming request for additional dedication amounted to unconstitutional taking, and board of commissioners, without taking evidence, upheld denial of license. Developer appealed. The Third District Court, Salt Lake Department, Timothy R. Hanson, J., found in favor of county. Developer appealed.

Holding: The Court of Appeals, Thorne, J., held that it was reversible error for trial court to receive evidence.

Reversed and remanded with directions.

Orme, J., dissented and filed opinion.

1. Statutes ⇐188, 212.6

In context of statutory interpretation, courts presume that the legislature used each word advisedly and courts give effect to the term according to its ordinary and accepted meaning.

2. Zoning and Planning ⇐745.1

Court of Appeals reviews county's land use decision as if the appeal has come directly from the agency, rather than from district court; thus, the standard for Court of Appeals' review is the same standard established for district court's review. U.C.A. 1953, 17–27–1001.

3. Zoning and Planning ⇐744, 745.1, 747

On appeal from district court's review of county's land use decision, Court of Appeals' review is limited to the record provided by the county board of commissioners; Court of Appeals may not accept or consider any evidence outside the board's record and cannot weigh evidence anew, rather, Court of Appeals must simply determine, in light of the evidence before the board, whether a reasonable mind could reach the same conclusion as the board. U.C.A.1953, 17–27–1001.

4. Eminent Domain ⇐307(2)

Historically, takings determinations are mixed questions of law and fact.

5. Zoning and Planning ⇐641, 748

It was reversible error for trial court, on review of land use decision of county board of commissioners confirming denial of developer's application for license to develop subdivision, which decision was reached without board receiving any evidence, to receive evidence regarding developer's claim that predicate for denial, county's requirement that developer dedicate additional land for prospective street widening, amounted to unconstitutional taking; court lacked statutory authorization to receive evidence, and it could only determine whether board acted arbitrarily or capriciously, given the lack of record. U.C.A.1953, 17–27–1001(3)(a).

Stephen G. Homer, West Jordan, for Appellant.

Donald H. Hansen, Salt Lake County Attorney's Office, Salt Lake City, for Appellee.

Before Judges BENCH, ORME, and THORNE, JJ.

OPINION

THORNE, Judge:

¶ 1 B.A.M. Development, L.L.C. (BAM), appeals from a district court decision finding

that no unconstitutional taking occurred when Salt Lake County (the County) required BAM to dedicate additional land as a condition of subdivision approval. We reverse and remand.

BACKGROUND

¶ 2 In 1997, BAM sought to develop a subdivision located at 7755 West 3500 South in Salt Lake County, Utah. The Salt Lake County Planning and Zoning Commission (the Commission) granted preliminary approval for the proposed subdivision. In the original subdivision plat, BAM agreed to dedicate a forty-foot strip of land in anticipation of 3500 South being widened. In April 1998, the County informed BAM that after consulting with the Utah Department of Transportation (UDOT), the County had determined that BAM must dedicate an additional thirteen-foot strip of land abutting 3500 South in anticipation of future road expansion. BAM objected to the increase because it had already drafted and divided the subdivision plots utilizing the forty-foot dedication.[1] BAM argued that increasing the dedication to fifty-three feet would alter several plots dramatically and would require reconfiguration of the subdivision at great expense. Without receiving any evidence, the Commission denied BAM's license to develop their subdivision without the fifty-three-foot dedication.

¶ 3 BAM appealed to the Salt Lake County Board of Commissioners (the Board), by filing a "Notice of Claim" with the Board. In this Notice of Claim, BAM claimed that "[t]he uncompensated dedication and improvement of the additional roadway constitute[d] an unconstitutional 'taking,' not reasonably justified by the actual impact created by the proposed development." Without conducting a hearing, taking evidence, or issuing findings, the Board upheld the Commission's decision.

¶ 4 BAM then filed suit in district court claiming that the County's demand was unconstitutional because it was not roughly proportional, as required by *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S.Ct. 2309, 2319–20, 129 L.Ed.2d 304 (1994). After trial, the district court found in favor of the County, concluding that the rough proportionality test did not apply. BAM objected to the district court's findings of fact and conclusions of law and filed a motion for a new trial. The district court overruled BAM's objections and denied its motion for a new trial. BAM appeals.

ISSUE AND STANDARD OF REVIEW

¶ 5 BAM argues that the County's dedication requirement of thirteen additional feet constitutes a taking of its land without just compensation, in violation of the United States Constitution.[2] However, we must first determine whether the district court acted properly when it received evidence and then ruled on the constitutionality of the land-dedication requirement. Resolution of this issue requires statutory interpretation, which we review for correctness. *See Valley Colour Inc. v. Beuchert Builders Inc.*, 944 P.2d 361, 363 (Utah 1997) (noting that "'[i]n matters of pure statutory interpretation, an appellate court reviews a trial court's ruling for correctness and gives no deference to its legal conclusions'" (citations omitted)).

ANALYSIS

¶ 6 The County Land Use Development and Management Act, *see* Utah Code Ann. § 17-27-101 to -1003 (2001), authorizes counties "to enact all ordinances, resolutions, and

1. Below, BAM argued that "[t]he uncompensated dedication and improvement of the *additional* roadway constitutes an unconstitutional 'taking,' not reasonably justified by the actual impact created by the proposed development." (Emphasis added.) Thus, BAM did not challenge the dedication of the first forty feet of land and has waived review of that portion of the dedication.

2. BAM also argued that the County violated Utah's constitutional protections of Equal Protection and Uniform Operation of Laws. However, because we find that the district court misinterpreted Utah Code Annotated section 17-27-1001 (2001) and received evidence in this case when it should have found the Board's treatment of BAM's takings claim to be arbitrary and capricious, and we remand on that basis, we need not address the takings question or the other issues raised by BAM.

rules that they consider necessary for the use and development of land within the county ... unless ... expressly prohibited by law." *Id.* § 17-27-102(1).[3] If a landowner disagrees with a county land use decision, that landowner can appeal the decision, pursuant to Utah Code Annotated section 17-27-1001. Section 17-27-1001(3)(a) provides that when a county's land use decision is appealed to the district court, that court shall "presume that land use decisions and regulations are valid; and ... *determine only whether or not the decision is arbitrary, capricious, or illegal.*" *Id.* (emphasis added).[4] "A determination of illegality requires a determination that the decision violates a statute, ordinance, or existing law." Utah Code Ann. § 17-27-1001(3)(b).

[1] ¶ 7 While no Utah Court has specifically addressed the standard of review applicable to appeals brought pursuant to section 17-27-1001, we have addressed the standard of review for appeals taken pursuant to Utah Code Annotated section 17-27-708 (2001), which contains language similar to that of section 17-27-1001.[5] *Compare* Utah Code Ann. § 17-27-708, *with id.* § 17-27-1001. In the absence of any case law interpreting section 17-27-1001, we, by analogy, rely upon case law interpreting section 17-27-708.[6]

3. We cite to the most recent version of the statute for convenience. However, all amendments relevant to this opinion will be noted.

4. Utah Code Annotated section 17-27-1001 provides, in relevant part:

> (1) No person may challenge in district court a county's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted all administrative remedies.
> (2) (a) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.
> ....
> (3) (a) The courts shall:
> (i) presume that land use decisions and regulations are valid; and
> (ii) determine only whether or not the decision is arbitrary, capricious, or illegal.
> (b) A determination of illegality requires a determination that the decision violates a statute, ordinance, or existing law.

Utah Code Ann. § 17-27-1001(1), (2)(a),-(3)(a)(b) (2001)

5. Utah Code Annotated section 17-27-708 provides, in relevant part:

> (1) Any person adversely affected by any decision of a board of adjustment may petition the district court for a review of the decision.
> (2)(a) *The district court's review is limited to a determination of whether the board of adjustment's decision is arbitrary, capricious, or illegal.*
> (b) A determination of illegality requires a determination that the board of adjustment's decision violates a statute, ordinance, or existing law.
> ....
> (4)(a) The board of adjustment shall transmit to the reviewing court the record of its proceedings including its minutes, findings, orders and, if available, a true and correct transcript of its proceedings.
> ....
> (5)(a) ...
> (i) *If there is a record, the district court's review is limited to the record provided by the board of adjustment.*
> (ii) *The court may not accept or consider any evidence outside the board of adjustment's record unless that evidence was offered to the board of adjustment and the court determines that it was improperly excluded by the board of adjustment.*
> (b) *If there is no record, the court may call witnesses and take evidence.*
> (6) The court shall affirm the decision of the board of adjustment if the decision is supported by substantial evidence in the record.

Utah Code Ann. § 17-27-708, (1), (2)(a), (4)(a), (5)(a), (5)(b), (6) (2001) (emphasis added).

6. We acknowledge that the analogy to section 17-27-708 is not perfect. For example, section 17-27-708(5)(b) authorizes the district court to call witnesses and receive evidence if no record was made below, *see id.* § 17-27-708(5)(b), or if on review the district court determines that the Commission erroneously excluded evidence. *See id.* § 17-27-708(5)(a)(ii). In contrast, section 17-27-1001 does not authorize the district court to receive evidence or call witnesses. However, this distinction merely strengthens our position that the district court erred in receiving evidence. In the case of section 17-27-1001, the legislature did not authorize the district court to receive evidence even though it had done so in other situations. *See* Utah Code Ann. § 17-27-708(5)(b). "[W]e ' "presume that the legislature used each word advisedly and [we] give effect to the term according to its ordinary and accepted meaning." ' " *Department of Natural Res. v. Huntington-Cleveland Irrigation Co.*, 2002 UT 75,¶ 13, 52 P.3d 1257 (citations omitted). Accordingly, we conclude that section 17-27-1001 does not authorize the district court to receive evidence. Instead, the district court can only review the record made before the County.

[2, 3] ¶ 8 In *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602 (Utah Ct. App.1995), landowners sought a "special exception under a county zoning ordinance." *Id.* at 603. The county conducted a hearing, received evidence, and then granted the exception. *See id.* Pursuant to section 17-27-708, another landowner appealed the decision to the district court, where the county's actions were found to be "arbitrary, capricious, and illegal." *Patterson*, 893 P.2d at 603. The matter was then appealed to this court. *See id.* On appeal, the parties attempted to introduce new evidence. *See id.* at 610–11. We concluded, because the board of adjustments had conducted a hearing and received evidence, that we were limited to the existing record. *See id.* at 604. In reaching this conclusion, we stated:

> Since the district court's review of the Board's decision was limited to a review of the Board's record, we do not accord any particular deference to the district court's decision. Instead, we review the Board's decision as if the appeal had come directly from the agency. Thus, the standard for our review of the Board's decision is the same standard established in the Utah Code for the district court's review.
>
> . . . .
>
> In determining whether substantial evidence supports the Board's decision we will consider all the evidence in the record, both favorable and contrary to the Board's decision. Nevertheless, our review, like the district court's review, "is limited to the record provided by the board of adjustment.... The court may not accept or consider any evidence outside the board['s] record...." We must simply determine, in light of the evidence before the Board, whether a reasonable mind could reach the same conclusion as the Board. It is not our prerogative to weigh the evidence anew.

Id. at 603–04 (citations and footnotes omitted.) [7]

Next, the dissent incorrectly claims that *Sandy City v. Salt Lake County*, 827 P.2d 212 (Utah 1992), prohibits our analogy to section 17-27-708. In *Sandy City*, the Utah Supreme Court cautioned against the use of statutes relating to cities in county-land-use appeals. *See id.* at 220. The court noted that " 'the respective statutes dealing with cities and counties confer different powers.' " *Id.* (citations omitted). The court further noted, in a footnote, that in the earlier appeal to the Utah Court of Appeals, we had erroneously relied on a municipal statute, had applied an incorrect standard of review, and had limited our review to the administrative record. *See id.* n. 4.

In *Sandy City*, no statute governed appeals from county land-use decisions. *See id.* In contrast, here, section 17-27-1001 sets forth this court's standard of review-whether the county's action was "arbitrary, capricious, or illegal." Utah Code Ann. § 17-27-1001(5)(b). Furthermore, in *Sandy City*, this court erroneously applied a municipal standard of review to a county land-use decision. *See Sandy City*, 827 P.2d at 220 n. 4. Here, contrary to the dissent's claim, we do not substitute section 17-27-708 for section 17-27-1001. Instead, we simply look to cases interpreting similar language to determine how the legislature intended courts to review county land use decisions.

Next, the dissent implies that we apply the standard of review set forth in section 17-27-708, while ignoring section 17-27-1001. We do not substitute the standard of review in section 17-27-708 for the one in section 17-27-1001. Instead, because of an absence of clear guidance by the legislature, we merely refer to section 17-27-708 by analogy because both statutes limit the district court's review to whether the county's decision is "arbitrary, capricious, or illegal." *Compare* Utah Code Ann. § 17-27-708(2)(a), *with id.* § 17-27-1001(3)(a).

Finally, the dissent makes much of the "County's concession in its brief that 'BAM followed the appeal procedure outlined in the Utah Statutes and corresponding Salt Lake County Ordinance provision[s].' " We agree. However, our focus is not on whether BAM followed the correct procedure, but whether the district court exceeded the scope of its authority pursuant to section 17-27-1001 when it received evidence in this case. Any "concession" made by BAM has no bearing on the propriety of the district court's actions.

7. In *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602 (Utah Ct.App.1995), we determined that appellate courts were bound by the record before the board of adjustments. *See id.* at 604 However, *Patterson* did not address the import of section 17-27-708(5)(b), which allows the district court to receive evidence if no record was made below. *See* Utah Code Ann. § 17-27-708(5)(1) (2001) Still, *Patterson* provides some guidance regarding how we should review appeals pursuant to section 17-27-1001, because it addresses a situation, like the one here, when the appellate court cannot receive evidence and can only determine, on the record before it, whether the administrative agency acted arbitrarily, capriciously, or illegally. *See Patterson*, 893 P.2d at 604.

¶ 9 Here, neither the Commission, nor the Board, received evidence on whether the County's requirement of an additional thirteen feet was a "taking." Instead, both approved the County's action without a hearing. Consequently, the district court had no record to review. The lack of a record apparently prompted the district court to receive evidence and determine for itself whether the County had unconstitutionally taken BAM's property. However, the plain language of section 17-27-1001 does not authorize the district court to receive evidence. *See* Utah Code Ann. § 17-27-1002(3)(a).[8] Thus, we conclude that the district court is limited to the record made before the County and can determine only whether the County's decision was "arbitrary, capricious, or illegal." *Id.* § 17-27-1001(3)(a)(ii); *see also Wilcox v. CSX Corp.*, 2003 UT 21,¶ 8, 70 P.3d 85 (noting that courts first look to the plain language of a statute and only look beyond the plain language if there is an ambiguity).[9]

[4] ¶ 10 The absence of a record in this case is highly problematic, because historically, takings determinations are mixed questions of law and fact. *See Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 1071, 112 S.Ct. 2886, 2922, 120 L.Ed.2d 798 (1992) (Blackmun, J., dissenting) (noting that whether government action has deprived a claimant of his property without just compensation is an "essentially [an] ad hoc, factual inquir[y]"). Moreover, Utah courts also have acknowledged that evaluating the reasonableness of an exaction is a fact-intensive inquiry.

¶ 11 In *Home Builders Ass'n v. City of American Fork*, 1999 UT 7, 973 P.2d 425, the Utah Supreme Court stated that "[exactions,] such [as] fees[,] are constitutionally permissible if the benefits derived from their exaction are 'of "demonstrable benefit" to the subdivision,' and if newly developed properties are not required to bear more than their equitable share of the capital costs in relation to the benefits conferred." *Id.* at ¶ 14 (quoting *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899, 905 (Utah 1981) (additional citation omitted)). In assessing the reasonableness of an exaction, a fact finder may consider, among other factors

> (1) the cost of existing capital facilities; (2) the manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants); (3) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as user charges, special assessments, or payment from the proceeds of general taxes); (4) the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future; (5) the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by the municipality and financed through general taxation or other means (apart from user charges) in other parts of the municipality; (6) extraordinary costs, if any, in servicing the newly developed properties; and (7) the time-price differential inherent in fair comparisons of amounts paid at different times

Id. at ¶ 5 (quoting *Banberry*, 631 P.2d at 903–04). This list, while not exhaustive, illustrates that the determination of whether an exaction is reasonable is a fact-intensive inquiry.

8 The dissent argues that even if we were to apply section 17-27-708 to the instant appeal "it would not change the result." We do not advocate the substitution of section 17-27-708 for section 17-27-1001. Instead, we simply refer to case law interpreting section 17-27-708 to support our conclusion that the district court's role in this case is limited to determining whether the Board acted arbitrarily, capriciously, or illegally in summarily denying BAM's taking claim.

9. The dissent spends considerable time discussing the differences between boards of adjustments and county commissions. We acknowledge the distinction between these two bodies, but note that review from both is limited to whether the decision was arbitrary, capricious, or illegal. This similarity is the basis for our analogy to section 17-27-708.

[5] ¶ 12 Here, the absence of a record at the administrative level prevented the district court from evaluating the propriety of the Board's action as directed by Utah Code Annotated section 17-27-1001(3)(a). We conclude that the district court erred when it received evidence on BAM's taking claim. The district court should have, instead, determined that the Board, in the absence of an adequate factual record, acted arbitrarily and capriciously in deciding BAM's takings claim.

¶ 13 Thus, we reverse the district court's decision and remand the case directing the district court to enter a judgment that the Board acted arbitrarily and capriciously when it failed to conduct a hearing on BAM's takings claim. The district court should then remand the case to the proper county agency, directing that agency to conduct a proper hearing on BAM's takings claim.[10]

¶ 14 However, because we anticipate that a county body will have to determine the constitutionality of the exaction, we provide some guidance regarding the proper standard to apply. BAM argues that its property has been taken without just compensation.

> The Takings Clause, which applies to the states through the Fourteenth Amendment, declares: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. One of the Clause's primary purposes is " 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "

Smith Inv Co v Sandy City, 958 P.2d 245, 257 (Utah Ct App 1998) (quoting *Dolan v City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 2316, 129 L Ed.2d 304 (1994)). One type of "taking" associated with subdivision approval is a "development exaction."

> [D]evelopment exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer's project. Usually, exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval. Development exactions may take the form of: (1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees.

Salt Lake County v. Board of Educ., 808 P.2d 1056, 1058 (Utah 1991) (quotations and citations omitted); *see also* No. 13 Richard R. Powell, *Powell on Real Property*, § 79D.04[2][a], 295–96, (Michael Allan Wolf ed., 2003) (noting that "exactions" are generally sought through several methods (1) land dedication requirements, (2) land dedication requirement with fee option, (3) impact fees, or (4) in-kind exactions) In *Dolan v City of Tigard*, 512 U.S. 374, 114 S.Ct 2309, 129 L.Ed.2d 304 (1994) and *Nollan v California Coastal Comm'n*, 483 U.S 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the United States Supreme Court developed a two-part test for determining whether a particular developmental exaction violated the takings clause of the United States Constitution.

¶ 15 In *Dolan*, the Court concluded that for a development exaction to be constitutional, the government must show an " 'essential nexus' . . . between the 'legitimate state interest' " and the land dedication requirement. 512 U.S. at 386, 114 S.Ct. at 2317 (citation omitted). The Court further explained that to succeed the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391, 114 S.Ct. at 2319–

10. Effective in 2000, Salt Lake County substantially changed its governmental structure Prior to the change, the County was governed by three County Commissioners We remand this case directing the district court to order a hearing on BAM's takings claim However, in light of the change in county structure remand to the Board of Commissioners is impossible Thus, the district court must also determine which Salt Lake County governmental body should consider BAM's takings claim

> The dissent attacks this approach as repugnant to the important principles of judicial economy " While we admit that in this case it might be quicker to ignore the appropriate standard of review and address the merits of this case, we would do so in direct opposition to the mandate of Utah Code Annotated section 17-27-1001 The more appropriate approach is to balance the desire for judicial economy against the need for judicial restraint In this case, as in most cases judicial restraint should, and does, prevail

20 The Court labeled this examination a "rough proportionality" test. *Id* at 391, 114 S.Ct. at 2319.

¶ 16 Here, BAM was required to dedicate thirteen additional feet of land that abutted 3500 South before the County would approve its subdivision plat. We conclude that this constitutes a developmental exaction as described in *Nollan* and *Dolan*. Accordingly, the *Nollan/Dolan* "rough proportionality" test applies in this case Therefore, upon remand, the reviewing body must determine: (1) whether requiring the exaction serves a legitimate government interest, and (2) whether there is a " 'rough proportionality' " between the exaction and the "impact of the proposed development." *Dolan*, 512 U.S. at 391, 114 S.Ct. at 2319–20, *see also* No. 13 Richard R. Powell, *Powell on Real Property*, § 79D 04[2][a], 295–96, (Michael Allan Wolf ed., 2003).[11]

CONCLUSION

¶ 17 We conclude that the district court exceeded its authority when it conducted a hearing and received evidence on BAM's takings claim contrary to the limits established in Utah Code Annotated section 17–27–1001(3)(a). The district court should have concluded that the Board acted arbitrarily and capriciously in deciding BAM's taking issue without conducting a hearing. Accordingly, we reverse the district court's decision, and remand directing the district court to set aside the Board's determination. The district court shall then identify the proper body to conduct a full hearing on the merits and remand the case to that body

¶ 18 I CONCUR. RUSSELL W BENCH, Judge.

ORME, Judge (dissenting):

¶ 19 With neither party having so argued, it is perplexing that the majority insists on analyzing the propriety of the trial court's actions under Utah Code Ann. § 17–27–708 (2001), while at the same time admitting that this appeal is governed by Utah Code Ann. § 17–27–1001 (2001). I disagree with this approach and the remedy of starting over before an entity of county government yet to be selected by the trial court. This result is especially disturbing given the County's concession in its brief that "BAM followed the appeal procedure outlined in the Utah statute and corresponding Salt Lake County Ordinance provision[s]."

¶ 20 Under both sections 17–27–708 and 17–27–1001, judicial review "is limited to a determination of whether the [challenged] decision is arbitrary, capricious, or illegal" Utah Code Ann § 17–27–708(2)(a) *See* Utah Code Ann. § 17–27–1001(3)(a)(ii) However, section 17–27–708 restricts the trial court's authority to take evidence, while section 17–27–1001 does not. By its own terms, section 17–27–708 applies only to trial court review of "any decision of a board of adjustment." *Id.* § 17–27–708(1) BAM's appeal was not, of course, from a decision of a board of adjustment, but from a decision of the Salt Lake County Board of Commissioners. This distinction is significant, given the very limited purview of a board of adjustment's powers and duties, which, at the time of BAM's appeal to the County Commission, was to "hear and decide appeals from *zoning* decisions applying the *zoning* ordinance[,] special exceptions to the terms of the *zoning* ordinance[, and] variances from

11. In *Dolan v City of Tigard*, 512 U S 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), the United States Supreme Court announced for the first time a "rough proportionality" test to apply when evaluating the constitutionality of exactions *Id* at 391, 114 S Ct at 2319 In *Dolan*, the Court acknowledged that the majority of states have adopted a 'reasonable relationship" test *Id* The Court concluded that the "reasonable relationship" test was close[ ] to the federal constitutional norm' *Id* However, the Court declined to adopt the phrase ' reasonable relationship" because of its similarity to the phrase rational basis" *Id* In all other respects, it appears that the Court adopted a "reasonable relationship" test and simply renamed it the "rough proportionality" test

Utah has also applied the "reasonable relationship ' test when evaluating the constitutionality of an exaction *See, e g , Home Builders Ass n v City of Am Fork*, 1999 UT 7,¶ 14–16 973 P 2d 425 (applying the reasonable relationship test to a real estate development fee) *Banbury Dev Corp v South Jordan City*, 631 P 2d 899 905 (Utah 1981) (applying the reasonable relationship' " test to a subdivision impact fee (citation omitted))

the terms of the *zoning* ordinance." Utah Code Ann. § 17-27-703(1)(a)-(c) (1995) (emphasis added).[1] The Salt Lake County zoning ordinances, contained in Title 19 of the Salt Lake County Code of Ordinances, are not relevant to this appeal. Rather, this appeal contests the County's power to require highway dedication from abutting property owners under Title 15 of the Salt Lake County Code of Ordinances. Understanding the difference in function between a board of adjustment and a county commission goes a long way in demonstrating that there is a rational basis for the distinction between section 17-27-708, applicable only to judicial review of board of adjustment decisions, and section 17-27-1001, applicable to land use decisions generally. Such an understanding dispels any notion that the Legislature meant to include section 17-27-708's restriction in section 17-27-1001, but just forgot to say so, or that, on some other basis, the restriction should be grafted onto section 17-27-1001.

¶ 21 Boards of adjustment are adjudicative bodies—they take sworn testimony and compel the attendance of witnesses, *see id.* § 17-27-702(3); they keep records of their proceedings, *see id.* § 17-27-702(4)(b)(ii); and they may even choose to make their record with the same completeness as a district court, i.e., by means of a court reporter or tape recorder. *See id.* § 17-27-702(4)(c). In sharp contrast, county commissions are not, first and foremost, adjudicative bodies and thus are not positioned to generate the kind of record that a board of adjustment will. Thus, a restriction on judicial roving into the evidentiary realm in the case of a board of adjustment decision makes sense: There should already be an adequate record. However, in contrast, it makes no sense to preclude a court from taking evidence where a county commission has made the decision under attack because no equivalent record will ordinarily have been made by the county commission.[2] Therefore, the general provision set forth in section 17-27-1001 controls, not the provision limited, by its own terms, to boards of adjustment.

¶ 22 The majority argues that the language in section 17-27-708 "strengthens [its] position that the district court erred in receiving evidence" because section 17-27-1001 is silent on the matter. Specifically, section 17-27-708(5)(a)(ii)-(b) states: "The [trial] court may not accept or consider any evidence outside the board of adjustment's record *unless* that evidence was offered to the board of adjustment and the court determines that it was improperly excluded by the board of adjustment [or] there is no record." *Id.* (emphasis added). The logic of the majority's argument is flawed. Section 17-27-708 restricts the trial court's authority to take evidence unless one of the two enumerated exceptions applies. Section 17-27-1001, however, contains no such restriction. Without the restriction, there is no hindrance to the trial court's receiving evidence. *See Biddle v. Washington Terrace City*, 1999 UT 110,¶ 14, 993 P.2d 875 ("[O]missions in statutory language should 'be taken note of and given effect.' ") (quoting *Kennecott Copper Corp. v. Anderson*, 30 Utah 2d 102, 514 P.2d 217, 219 (1973)). Indeed, if silence meant the trial court cannot consider evidence in the absence of express authorization, there would simply be no reason for the restriction expressed in section 17-27-708—it would already be the case that evidence could not ordinarily be received by the reviewing court.

1. The powers and duties of the board of adjustment have since been expanded. *See* Utah Code Ann. § 17-27-703 (2001).

2. Prior cases have distinguished boards of adjustment from local legislative bodies, both at the county level, *see Toone v. Weber County*, 2002 UT 103,¶ 7, 57 P.3d 1079 (recognizing that section 17-27-707, for example, "grant[s] boards of adjustment limited power to grant zoning variances"); *Levie v. Sevier County*, 617 P.2d 331, 333 (Utah 1980) (stating that "the *County Commission* is charged with the responsibility for approving *subdivision plats*—not the Board of Adjustment") (emphasis in original), and at the municipal level. *See Bradley v. Payson City Corp.*, 2003 UT 16,¶ 13, 70 P.3d 47 ("[A] board of adjustment is a quasi-judicial body designed only to correct specific zoning errors."), *Harmon City, Inc. v. Draper City*, 2000 UT App 31,¶ 16, 997 P.2d 321 (noting that "[t]he distinction between quasi-judicial decisions of a board of adjustment as opposed to legislative municipal zoning decisions is significant: boards of adjustment have no legislative powers and are not permitted to have those powers").

¶ 23 Significantly, this court has previously relied on a statute applicable to a board of adjustment decision in an appeal stemming from a planning commission decision, only to have our error corrected by the Utah Supreme Court. In *Sandy City v. Salt Lake County*, 794 P.2d 482 (Utah Ct.App.1990) (*Sandy City I*), *rev'd*, 827 P.2d 212 (Utah 1992) (*Sandy City II*), this court applied former section 10–9–15,[3] the municipal analogue to current section 17–27–708, to an appeal stemming from an action of the Salt Lake County Planning Commission. *See Sandy City I*, 794 P.2d at 486. In so doing, this court stated that its review was limited to the administrative record. *See id.* The Utah Supreme Court called attention to our error in *Sandy City II*, indicating that "the court of appeals [mistakenly] confined its review to the administrative record," because, "[f]irst, section 10–9–15 applies only to municipalities, not to counties[, and s]econd, section 10–9–15 applies only to relief sought from the actions of the board of adjustment, not from the actions of the planning commission or the board of county commissioners." 827 P.2d at 220 n. 4. Interestingly, the Court also noted that, "[a]t the time [*Sandy City I* was decided], no analogous statute regulated legal grievances arising from the actions of Salt Lake County or the planning commission; consequently, there was no basis for the court of appeals to confine its review to the administrative record." *Sandy City II*, 827 P.2d at 220 n. 4.

¶ 24 Contrary to the law in existence at the time *Sandy City I* was decided, we *do* now have a statute that controls appeals from land use decisions of the Salt Lake County Board of Commissioners—section 17–27–1001. If it is improper to apply a statute applicable to actions of a board of adjustment even when there is no comparable statute governing appeals from another governmental body, it seems axiomatic that it would be improper to do so when there is such a statute.

¶ 25 But even if it were somehow proper to analyze the trial court's actions under section 17–27–708, it would not change the approach in the instant appeal. As the majority recognizes, a trial court may not "accept or consider any evidence outside the board of adjustment's record" under section 17–27–708 unless: (1) there is no record, *see id.* § 17–27–708(5)(b), or (2) "evidence was offered to the board of adjustment and the court determines that it was improperly excluded." *Id.* § 17–27–708(5)(a)(ii). Because there was no record made in connection with BAM's appeal to the Salt Lake County Board of Commissioners, the instant case fits squarely within the exception enumerated in section 17–27–708(b).[4] Therefore, even if we do look to section 17–27–708 in analyzing the trial court's actions, as the majority urges, the court properly called witnesses and took evidence, which evidence is properly now part of our record. *See Xanthos v. Board of Adjustment*, 685 P.2d 1032, 1034 (Utah 1984) (" 'The nature and extent of [judicial] review depends on what happened below as reflected by a true record of the proceedings' [before the board of adjustment. Thus], if the hearing had proceeded in accordance with due process requirements, the reviewing court could look only to the record, but where it had not *or where there was nothing to review*, the reviewing court must be al-

3. That section provided, in relevant part, that "any person aggrieved by any decision of the board of adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction." Utah Code Ann. § 10–9–15 (1986).

4. It is curious, then, that the majority cites *Patterson v. Utah County Board of Adjustment*, 893 P.2d 602 (Utah Ct.App.1995), in support of its proposition that the trial court erroneously received evidence in the instant case. As the majority recognizes, the board of adjustment in *Patterson* conducted a hearing and received evidence. *See id.* at 603. Therefore, pursuant to section 17–27–708, a reviewing court could not receive additional evidence in that case unless it determined that such evidence "was improperly excluded by the board." Utah Code Ann. § 17–27–708(5)(a)(ii). BAM's appeal, on the other hand, was summarily denied by the Salt Lake County Board of Commissioners, whose response consisted entirely of the following statement: "The Board of County Commissioners, at its meeting held this day, upheld the planning commission approval and denied the request of B.A.M. Development, Inc., for an appeal on PL–97–1063, Westridge Meadows 7755 West 3500 South." *Patterson*, then, is quite unlike the case before us.

lowed to get at the facts.") (emphasis added) (decided under former section 10–9–15). *Accord Davis County v. Clearfield City*, 756 P.2d 704, 709–10 (Utah Ct.App.), *cert. denied*, 765 P.2d 1278 (Utah 1988).

¶ 26 Accordingly, the appeal is ripe for decision by this court and, in my view, it should be resolved at this juncture.[5] If I were writing the opinion for the court, I would write as follows:

* * *

¶ 27 Plaintiff B.A.M. Development, L.L.C. (BAM) appeals the trial court's decision holding that Defendant Salt Lake County (the County), acting pursuant to its Transportation Master Plan, could constitutionally require BAM to dedicate a fifty-three-foot right-of-way, without compensation, as a condition to approval of BAM's subdivision proposal. The trial court's decision should be reversed and remanded.

BACKGROUND[6]

¶ 28 Salt Lake County Ordinance 15.28.010, enacted under authority of Utah Code Ann. § 17–27–801 (2001), requires dedication and improvement of public street right-of-way space by developers of abutting property in accordance with the County's Transportation Master Plan. The Transportation Master Plan is based on traffic projections and recommendations from the Wasatch Front Regional Council and the Utah Department of Transportation (UDOT), including a long-range transportation study projecting highway capacity needs in Salt Lake County to the year 2020.

¶ 29 In July of 1997, BAM submitted a proposal to develop Westridge Meadows subdivision on a fifteen-acre parcel at approximately 7700 West 3500 South in unincorporated Salt Lake County. BAM's fee simple interest in the parcel proposed for subdivision development extended to the center line of 3500 South Street at its northern boundary. Pursuant to Salt Lake County Ordinance 15.28.010, BAM's proposed plat indicated a forty-foot half-road-width dedication at 3500 South Street, running along the northern boundary of BAM's adjacent property. The dedication was to be used for the eventual widening of 3500 South, a state highway abutting the proposed subdivision. 3500 South is a thoroughfare used by the traveling public, which will also be used by future subdivision residents, although the highway is not directly accessible from the subdivision.

¶ 30 On September 9, 1997, the County approved BAM's subdivision proposal subject to compliance with County ordinances and departmental requirements in these terms:

1. Construction of curb, gutter, sidewalk and street improvements on proposed and adjoining streets including 3500 South (sidewalk on 3500 South to be 6' wide and placed next to the fence).
2. Elimination, relocation, piping, or fencing open ditches and/or canals within or adjacent to the subdivision by subdivider as agreeable to irrigation users or company.
3. Construction of a 6' high non-climbable barrier fence along 3500 South as these lots are non-vehicular access to 3500 South. A gate is to be constructed on each lot for property owner access and this note to be on Mylar.
4. Dedication of 40' from the center line of 3500 South to Salt Lake County for street right-of-way.
5. Modification of design as worked out by County Departments and subdivider.
6. Final plat to be drawn on a subdivision mylar by a licensed surveyor.
7. Street on west to be dedicated and constructed with curb and gutter on

5. This sound approach, fully consistent with the plain language of the statutory sections analyzed, also advances the cause of avoiding inefficiency, duplication, and delay. Considerable court resources have already been expended on this case, resulting in a two-day bench trial which produced a voluminous record. It has been briefed and argued to this court and, as will be obvious, has been the object of much deliberation and analysis. Remanding this case to the trial court with instructions to send it back to the County to repeat the fact-finding process, is repugnant to the important principle of judicial economy

6. This opinion borrows liberally from the trial court's Findings of Fact

west side and curb, gutter & sidewalk on east side.

8. Comply with all conditions of the .2 overpressure zone. This note to be on mylar.
9. A minimum 15' wide landscaping area to be installed along 3500 South. The landscape strip to be maintained by the adjacent property owner. Plan to be approved by Development Services Staff.
10. Install traffic calming devices as approved by Transportation Engineer.

¶ 31 On September 15, 1997, UDOT received BAM's subdivision proposal. UDOT responded that the current required highway dedication for 3500 South at the location of BAM's proposed subdivision was a fifty-three-foot half-road-width right-of-way, not forty feet, as indicated by the County's Transportation Master Plan. In June of 1998, the County incorporated the revised right-of-way requirement of fifty-three feet into its Transportation Master Plan. That same month, the County granted preliminary approval of BAM's subdivision proposal subject to compliance with, among other things, the fifty-three-foot right-of-way dedication.[7]

¶ 32 On July 2, 1998, BAM filed a notice of appeal with the Salt Lake County Board of Commissioners, challenging the constitutionality of the County's requirement of a fifty-three-foot dedication and the resulting "increased expenses" and requesting approval of the subdivision proposal with a forty-foot dedication. The Board of County Commissioners summarily denied BAM's appeal, and BAM filed suit against the County in district court, alleging, among other things, that the County's development exactions were "unreasonable and excessive" and effected a taking of BAM's property without just compensation. After a two-day bench trial, the trial court entered judgment in favor of the County on all counts, concluding that, inter alia, "BAM failed to establish a cause of action on its 'takings' claim." The trial court subsequently denied BAM's "Motion for Entry of New Findings and/or Additional Findings" and its "Motion for a New Trial," and BAM appealed to this court.

¶ 33 While the above litigation was in process, the County approved BAM's amended subdivision plat, which had been modified, under protest, to include the required fifty-three-foot highway dedication. In August of 1999, BAM's subdivision plat was recorded in the Salt Lake County Recorder's Office, and BAM later began construction of Westridge Meadows.

ISSUE AND STANDARD OF REVIEW

¶ 34 BAM raises several issues on appeal, but its first argument is dispositive. BAM argues that requiring it to dedicate property for eventual use in widening a street, and improve adjacent property, all without compensation, as a condition to approval of its subdivision proposal, constitutes an unconstitutional "taking" of its property in violation of both federal and state law. This question of law is reviewed under the "correction-of-error standard[ ]," with no particular deference accorded to the trial court. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

ANALYSIS

I. Introduction: Takings Jurisprudence

¶ 35 BAM argues that requiring it to dedicate a fifty-three foot strip of property and undertake various improvements to property outside the subdivision as a condition to approval of its subdivision proposal effects a "taking" in violation of state and federal constitutional law. Before proceeding to the merits of this claim, it is necessary to discern the nature of BAM's takings challenge.[8] In

7. The June 1998 approval was contingent upon additional requirements which, aside from the fifty-three-foot dedication, substantially mirror the September 1997 requirements listed above. However, the June 1998 approval eliminated the former requirement regarding "[a] minium 15' wide landscaping area ... along 3500 South" and added a requirement that the landowner "[i]nstall an emergency service turnaround as required by the Fire Department."

8. At oral argument, BAM correctly characterized its claim as one for inverse condemnation, which "is simply a generic description applicable to all actions in which a property owner, in the absence of a formal condemnation [i.e., eminent domain] proceeding, seeks to recover from a

so doing, this opinion first summarizes relevant United States Supreme Court jurisprudence.[9]

¶ 36 The Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, *see Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241, 17 S.Ct. 581, 586, 41 L.Ed. 979 (1897), provides that "private property [shall not] be taken for public use, without just compensation."[10] U.S. Const. amend. V. The Court has traditionally recognized two categories of takings: "physical takings" and so-called "regulatory takings." *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 527, 112 S.Ct. 1522, 1528, 118 L.Ed.2d 153 (1992) (distinguishing the Court's "regulatory takings cases" from its "physical takings" cases); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430, 102 S.Ct. 3164, 3173, 73 L.Ed.2d 868 (1982) (distinguishing a "physical occupation" from a "regulation that merely restricts the use of property"); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (implicitly recognizing distinct categories of physical and regulatory takings); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 Yale L.J. 547, 559 (2001) ("[I]t is indisputable that the case law recognizes the existence of two types of takings: physical takings and regulatory takings."). Each of these more familiar types of takings, and a third category known as "development exactions," are addressed below.

A. Physical Takings

¶ 37 A physical taking requires government activity in the form of an invasion, occupation, or intrusion. *See, e.g., Loretto*, 458 U.S. at 426, 102 S.Ct. at 3171. "[G]overnmental action [that] results in '[a] permanent physical occupation' of the property, by the government itself or by others," *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3146 (1987) (second alteration in original) (citation omitted), constitutes a per se taking and "requires compensation under the [Takings] Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 2457, 150 L.Ed.2d 592 (2001). *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992) ("[A]t least with regard to permanent invasions[ ], no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."). *Cf. Yee*, 503 U.S. at 539, 112 S.Ct. at 1534 ("Because the ... ordinance does not compel a landowner to suffer the

governmental entity for the appropriation of his property interest." 2A Nichols, Eminent Domain § 6.14[1], at 6–227 (3d ed.2002). "[T]he inverse condemnation action is available to any landowner who suffers destruction or impairment of a protected private property right." *Id.* § 6.14[1], at 6–230. Moreover, although BAM correctly points out that inverse condemnation claims brought under Article I, Section 22 of the Utah Constitution are "self-executing," this means only that such claims may be brought even absent authorizing legislation and that such claims are exempt from the limitations found in the Utah Governmental Immunity Act. *See Colman v. Utah State Land Bd.*, 795 P.2d 622, 630–35 (Utah 1990). It does not follow, as BAM contends, that inverse condemnation claims are automatically exempt from requirements such as exhaustion of administrative remedies.

9. The lack of a "coherent test" and resulting "sea of uncertainty" in takings law inspired one pair of commentators to quip that "takings jurisprudence is considered a leading candidate for the 'doctrine-in-most-desperate-need-of-a-principle prize.' " Abraham Bell & Gideon Parchomovsky, *Givings*, 111 Yale L.J. 547, 558–60 (2001) (citation omitted). Another scholar noted that "[t]he incoherence of the U.S. Supreme Court's output in this field has by now been demonstrated time and again by practitioners and academic commentators ad nauseam, and I refuse to add to the ongoing gratuitous slaughter of trees for the paper consumed in this frustrating and increasingly pointless enterprise." Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 The Urban Lawyer 307, 308 (Spring 1998). Nevertheless, a summary of takings jurisprudence is important in the disposition of BAM's appeal, especially considering the dearth of Utah case law on the subject.

10. Similarly, the Utah Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Utah Const. art. I, § 22. The Utah provision has been characterized as broader than its federal counterpart because it protects not only property that is "taken," but also property that is "damaged" for public use. *See Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995).

physical occupation of his property, it does not effect a *per se* taking under *Loretto.*") (emphasis in original).

B. Regulatory Takings

¶ 38 In contrast to a physical taking, a regulatory takings claim challenges state or local laws that impose "regulations" or "restrictions" on the "*use*" of property. *Yee,* 503 U.S. at 532, 539, 112 S.Ct. at 1531, 1534 (emphasis in original). *See Loretto,* 458 U.S. at 430, 102 S.Ct. at 3173 ("[R]ecent cases confirm the distinction between a permanent physical occupation ... and a regulation that merely restricts the use of property."). In the famous words of Justice Holmes, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). However, "[i]n 70–odd years of succeeding regulatory takings jurisprudence, [the Court has] generally eschewed any set formula for determining how far is too far." *Lucas,* 505 U.S. at 1015, 112 S.Ct. at 2893 (quotations and citations omitted). Instead, the Court has "examined the taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action—that have particular significance." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 349, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986) (quotations and citations omitted).

¶ 39 Despite the ad hoc nature of regulatory takings inquiries, at least one general rule has emerged: "[T]he Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.' " *Lucas,* 505 U.S. at 1016, 112 S.Ct. at 2894 (emphasis omitted) (quoting *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)).[11] *Cf. Three D Corp. v. Salt Lake City,* 752 P.2d 1321, 1325 (Utah Ct.App.1988) ("Where governmental action, not amounting to a physical taking, effectively deprives a property owner of reasonable access to property, the owner is entitled to compensation[.]") (footnote omitted). This general rule incorporates the underlying principle that while "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]' ... [t]hey have made clear ... that a broad range of governmental purposes and regulations satisfies these requirements." *Nollan,* 483 U.S. at 834–35, 107 S.Ct. at 3147. *See also Loretto,* 458 U.S. at 441, 102 S.Ct. at 3179 ("We do not ... question the substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.") (emphasis in original).

C. Development Exactions

¶ 40 Along with the traditional categories of physical and regulatory takings, a third category of takings has emerged in the case law, namely "development exactions."[12]

11. The per se rule of *Lucas* is not absolute, but is limited by "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1028, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 798 (1992).

12. It is helpful to think of exactions as sort of a hybrid between physical and regulatory takings. The Court acknowledged as much in *Nollan v. California Coastal Commission* when it characterized "a classic right-of-way easement" as a physical taking but nevertheless applied the regulatory takings test. 483 U.S. 825, 831 & n. 1, 107 S.Ct. 3141, 3146 & n. 1, 97 L.Ed.2d 677 (1987) ("We think a 'permanent physical occupation' has occurred ... where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."). The Court explained: "Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome." *Id.* at 834, 107 S.Ct. at 3147. The Court then applied the regulatory takings test of whether the regulation " 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Id.* (alterations in original) (citations omitted).

Similarly, in *Dolan v. City of Tigard,* the Court distinguished the garden-variety regulatory tak-

" '[D]evelopment exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer's project. Usually, exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval.' " *Salt Lake County v. Board of Educ.*, 808 P.2d 1056, 1058 (Utah 1991) (citation omitted). Exactions will generally "serve more than a single development," 8A Nichols, Eminent Domain § 17.01, at 17-7 (2002), and " 'may take the form of: (1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees and (4) impact fees.' " *Salt Lake County v. Board of Educ.*, 808 P.2d at 1058 (citation omitted). Exactions "enable local government to acquire land for highway expansion at no charge to the public. The dedicated land is reserved in its present state until the government is ready to widen the adjacent highway or construct a new roadway." 8A Nichols, Eminent Domain § 17.02[3], at 17-17.

¶ 41 In the famous *Nollan* and *Dolan* decisions, *see Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the Court adopted a two-pronged test that development exactions—at least when they take the form of forced dedications of property—must satisfy to withstand scrutiny under the Takings Clause.[13] In *Nollan*, the Court revisited the "long[-]recognized" rule that a "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Id.* at 834, 107 S.Ct. at 3147 (second and third alterations in original) (citation omitted). The Court acknowledged that it had "not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Id.* In addressing these questions, the Court set forth the first prong of the *Nollan/Dolan* test: there must be an " 'essential nexus' ... between the 'legitimate state interest' and the permit condition exacted by the [governmental entity] " *Dolan*, 512 U.S. at 386, 114 S.Ct. at 2317 (quoting *Nollan*, 483 U.S. at 837, 107 S.Ct. at 3148).

¶ 42 In *Dolan*, the Court resolved the question it left unanswered in *Nollan*: If an "essential nexus" exists, what is the required degree of connection between the exactions

ings cases from the case before it, which involved a redevelopment permit conditioned upon a forced dedication of land. *See* 512 U.S. 374, 385, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994). The Court stated:

> First, [those cases] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the *use* petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Id. (emphasis added). Thus, it is clear that exactions do not fit neatly into either the regulatory or physical takings jurisprudence. *See Rogers Mach., Inc. v. Washington County*, 181 Or.App. 369, 45 P.3d 966, 973 (characterizing exactions as an "amalgamation" between physical and regulatory takings and noting that "[e]xactions do not fit neatly within the more conventional Takings Clause analytical construct"), *review denied*, 334 Or. 492, 52 P.3d 1057 (Or.2002), *cert. denied*, 538 U.S. 906, 123 S.Ct. 1482, 155 L.Ed.2d 225 (2003); *Town of Flower Mound v. Stafford Estates*, 71 S.W.3d 18, 30 (Tex.App.) ("In an exaction takings case, the landowner is not simply denied or restricted in some desired use of his property. Rather, in an exaction takings case, some action—the exaction—is required of the landowner as a condition to obtaining governmental approval."), *review granted*, 2002 Tex. LEXIS 209 (Tex.2002); *Sparks v. Douglas County*, 127 Wash.2d 901, 904 P.2d 738, 742 (1995) (recognizing that "[the physical takings] rule does not necessarily apply where conveyance of a property right is required as a condition for issuance of a land permit"); 8 Nichols, Eminent Domain § 14E.04[4], at 14E-33 & 14E-34 (2002) ("[T]he *Dolan* rule applies only to case-by-case land exactions, and not to community wide zoning and land use regulations."); *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 Am U Admin. L.J. 253, 277 (1995) (designating *Dolan* as an example of a "special category of cases called dedication and exaction cases").

13. As explained more fully below, it is unclear whether the Court's analysis applies to development exactions other than forced dedications of property.

and the projected impact of the proposed development? [14] In response, the Court set forth the "rough proportionality" prong of the test, which requires the governmental entity to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391, 114 S.Ct. at 2319–20.

¶ 43 To summarize the *Nollan/Dolan* two-prong test, a development exaction in the form of a forced dedication of real property will constitute a taking, necessitating just compensation, unless the government demonstrates that (1) an " 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the [governmental entity]," and (2) "the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 386, 391, 114 S.Ct. at 2317, 2319–20.

¶ 44 After considering the rules and rationales underlying physical, regulatory, and exactions takings cases, it appears that BAM's claim most closely fits within the framework of the development exactions cases. The County conditioned approval of BAM's proposed subdivision on dedication of property to be used in the future for widening 3500 South—at least if the County's Master Transportation Plan were to be eventually implemented. The forced dedication is a " 'contribution[ ] to a governmental entity imposed as a condition precedent to approving the developer's project,' " which is within the definition of an exaction as set forth in *Salt Lake County v. Board of Education*, 808 P.2d at 1058 (citation omitted). More importantly, the facts of this case mirror the facts of both *Nollan*, where the landowner was forced to grant an easement to the public in exchange for a building permit, and *Dolan*, where the landowner was forced to dedicate a portion of her property to the city of Tigard in exchange for a development permit. *See Dolan*, 512 U.S. at 385–86, 114 S.Ct. at 2317.

¶ 45 Having concluded that BAM has stated a claim for an exaction in the form of a forced dedication of real property, it is necessary to determine what, if any, procedural requirements BAM must comply with and whether it has done so in this case.

II. Preservation of Issues

¶ 46 The County argues, and the trial court agreed, that "the only issue appealed by BAM to the County Commission, and thus preserved by exhaustion of administrative remedies, was the County's requirement of a 53–foot highway dedication, rather than a 40–foot dedication." Thus, the County maintains that "the only issue properly before this Court" is whether the thirteen-foot increase in the County's dedication requirement effected a taking of BAM's property. BAM, on the other hand, urges us to address the constitutionality of the entire fifty-three-foot dedication as well as the County's additional in-kind improvement requirements.

¶ 47 Although the County phrases its argument in jurisdictional terms, the County's objection, in reality, is one of issue-preservation rather than exhaustion of administrative remedies.[15] Tellingly, the County concedes

14. The Court did not address this question in *Nollan* because, while it "agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest," the Court determined there was no "essential nexus" between "visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot." *Dolan*, 512 U.S. at 386–87, 114 S.Ct. at 2317. Because the "essential nexus" prong was not satisfied, the Court had no occasion to decide "the required degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386, 114 S.Ct. at 2317.

15. In any event, it is far from clear that exhaustion requirements would apply to BAM, at least insofar as its challenge to the County's forced dedication of real property is concerned. It is true that in reference to a garden-variety land use regulation, "an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986). Such logic does not apply to a development exaction consisting of a forced dedication of real property. The County did not attempt to regulate the "use" of BAM's land, but conditioned its approval of BAM's subdivision proposal on a forced dedication of real

that "BAM followed the appeal procedure outlined in the Utah statute and corresponding Salt Lake County Ordinance provision[s]." Thus, the County's real quarrel is with the wording of BAM's appeal to the Board of County Commissioners, which challenges the County's decision to deny development approval with the 40–foot dedication and argues that the County's imposition of "increased expenses and uncompensated dedication of private property for public use, is arbitrary, capricious, ... and contrary to law."

¶ 48 It is true that "a party seeking review of agency action must raise an issue before that agency to preserve the issue for further review." *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998). Pursuant to the "level of consciousness" test, "a plaintiff [must] bring an issue to the fact finder's attention so that there is at least the possibility that it could be considered." [16] *Id.*

¶ 49 It must be concluded that BAM's appeal properly encompassed its objection to the entire dedication of real property such that the Board of County Commissioners was, or should have been, conscious of it. BAM's argument that the County should have approved its proposal with the 40–foot dedication does not foreclose its further argument that the County's requirement of "uncompensated dedication of private property," in whatever amount, is "unconstitutional."

¶ 50 Furthermore, this case is in a somewhat unusual posture because the "level of consciousness" test is being applied not to a hearing or other administrative proceeding, but to BAM's written notice of appeal. *Cf. Badger*, 966 P.2d at 847 (applying level of consciousness test to informal hearing before State Engineer); *US Xpress, Inc. v. Utah State Tax Comm'n*, 886 P.2d 1115, 1119 n. 7 (Utah Ct.App.1994) (applying level of consciousness test to hearing before State Tax Commission); *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 268–69 (Utah Ct. App.) (holding that plaintiff waived issues not presented to the administrative law judge during formal hearing), *cert. denied*, 868 P.2d 95 (Utah 1993). In light of the fact that the County Commission summarily denied BAM's appeal without a hearing, foreclosing the opportunity for BAM to develop and explain its concerns, an unnecessarily crabbed reading of BAM's notice of appeal is not required by the "level of consciousness" test, and that test does not foreclose consideration of the constitutionality of requiring the entire fifty-three-foot dedication.

¶ 51 A different conclusion is reached, however, on the question of whether BAM properly preserved its objection to the County's requirement that certain in-kind improvements be made. On appeal, BAM challenges, to an unclear extent, a number of improvements required by the County as a condition to subdivision approval, including installation of curbs, gutters, stormdrain lines, sidewalks, and fencing. BAM argues that such improvements are "unconstitutionally excessive and/or unreasonable." The only possible evidence of preservation of this argument in BAM's written appeal to the Board of County Commissioners is in BAM's objection to the County's "increased expenses." Even under the most liberal construction of BAM's notice of appeal, it cannot be said that this issue was sufficiently raised such that the Board of County Commissioners should have been conscious of it.

¶ 52 Furthermore, even if BAM had properly preserved this argument, BAM advances no convincing argument that the County's improvement requirements should be invali-

property. The only question is whether the County's exaction of BAM's property constituted a taking. *See Nelson v. City of Lake Oswego*, 126 Or.App. 416, 869 P.2d 350, 353 (1994) (en banc) ("[No] case of which we are aware attaches an exhaustion or ripeness prerequisite to the litigation of claims, like those here, that are based on a development condition that has resulted in the actual acquisition of a private property interest by the government.").

16. The "level of consciousness" test is a "less exacting standard" than that applied in a trial setting, where preservation requires that "(1) 'the issue ... be raised in a timely fashion;' (2) 'the issue ... be specifically raised;' and (3)[the] party must introduce 'supporting evidence or relevant legal authority.' " *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998) (quoting *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 130 (Utah Ct.App.), *cert. denied*, 953 P.2d 449 (Utah 1997)).

dated, or for that matter even analyzed, under *Nollan* and *Dolan*.[17] The County cannot force BAM to dedicate and improve 3500 South based solely on its own transportation planning goals, rather than on the impacts of BAM's subdivision, because this would force BAM "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). Nevertheless, there is "an important distinction between ordinances requiring installation of streets, sidewalks, sewers and drainage facilities which are inextricably tied to the needs of the subdivision development, and those ordinances which require dedication of land ... where the nexus between the use requirement and the subdivision development is less than evident." 2A Nichols, Eminent Domain § 6.13[3][b], at 6-218 (3d ed.2002). *See also Art Piculell Group v. Clackamas County*, 142 Or.App. 327, 922 P.2d 1227, 1234 (1996) ("[C]onditions that in whole or in part serve the needs of the development itself should be weighed differently than pure 'exactions' of the kind that serve only to mitigate an impact of the development on the public or public facilities.").

¶ 53 For example, the County's requirement that BAM install a fence and a sidewalk along the portion of its property abutting 3500 South seems to be "inextricably tied to the needs of [BAM's] subdivision," 2A Nichols, Eminent Domain § 6.13[3][b], at 6-218, because such improvements undoubtedly inure to the convenience and safety of the subdivision residents. In any event, absent proper preservation at the County Commission level and a well-developed argument on appeal, BAM's objection to the County's in-kind improvement requirements need be addressed no further.

III. Merits of BAM's Takings Challenge

¶ 54 Having resolved the threshold issue of preservation, this opinion proceeds to the merits of BAM's takings challenge. Although BAM has formulated its takings challenge to include separate claims for relief under both state and federal law, the legal principles underlying both claims are largely the same and this opinion therefore treats them concurrently. *See, e.g., San Remo Hotel v. City & County of San Francisco*, 27 Cal.4th 643, 117 Cal.Rptr.2d 269, 41 P.3d 87, 100-101 (2002) (construing federal and state takings clauses congruently); *Sparks v. Douglas County*, 127 Wash.2d 901, 904 P.2d 738, 741 (1995) (same).

¶ 55 As outlined above, it must now be determined whether the two-pronged *Nollan/Dolan* test is satisfied here. The County, however, argues that the *Nollan/Dolan*

17. This is not to say that improvement exactions may never be subject to *Nollan/Dolan* scrutiny. *See McClure v. City of Springfield*, 175 Or.App. 425, 28 P.3d 1222, 1227-28 (2001) (applying *Dolan* to city ordinance requiring dedication of property and installation of sidewalks, driveway improvements, and street lighting), *review denied*, 334 Or. 327, 52 P.3d 435 (2002); *Art Piculell Group v. Clackamas County*, 142 Or.App. 327, 922 P.2d 1227, 1230-31 (1996) (applying *Dolan* to county requirement that landowner dedicate and approve public street abutting his subdivision); *Clark v. City of Albany*, 137 Or.App. 293, 904 P.2d 185, 189 (1995) (applying *Dolan* to improvement exactions because the court saw "little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same purpose"), *review denied*, 322 Or. 644, 912 P.2d 375 (1996); *Town of Flower Mound v. Stafford Estates*, 71 S.W.3d 18, 33 (Tex.Ct.App.) (applying *Dolan* to town ordinance requiring road improvements because improvement exactions "involve conditional governmental land use approval and present the same opportunities for governmental 'leveraging' [as dedicatory exactions]"), *review granted*, 2002 Tex. LEXIS 209 (Tex.2002); *Benchmark Land v City of Battle Ground*, 94 Wash.App 537, 972 P.2d 944, 950 (1999) (holding that "*Nollan* and *Dolan* apply here where the City requires the developer as a condition of approval to incur substantial costs improving an adjoining street"), *aff'd on other grounds*, 146 Wash.2d 685, 49 P.3d 860 (2002); *Burton v. Clark County*, 91 Wash App. 505, 958 P.2d 343, 348, 357 (1998) (applying *Nollan/Dolan* to county requirement that permit applicants make "road dedications and improvements"), *review denied*, 137 Wash.2d 1015 978 P.2d 1097 (1999). *But see Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 264 Ga. 764, 451 S.E.2d 200, 201-02, 204 (1994) (refusing to apply *Dolan* to city parking lot ordinance requiring owners to install barrier curbs and landscaping improvements even though three dissenting justices argued that *Nollan* and *Dolan* were controlling), *cert. denied*, 515 U.S. 1116, 115 S.Ct 2261, 132 L.Ed.2d 273 (1995).

exactions analysis does not apply to this case. Specifically, the County argues, and the trial court agreed, that the *Nollan/Dolan* analysis applies only to "ad hoc discretionary assessment[s] imposed on an individualized basis" and not to "a generally-applicable legislative scheme, uniformly imposing a regulatory standard for road-width dedication by subdivision developments." [18]

¶ 56 In the instant case, it should not matter whether the County ordinance at issue here is indeed a "generally applicable" "uniformly imposed" legislative scheme because *Nollan/Dolan* heightened scrutiny [19] should apply to *any* forced dedication of real property, regardless of whether the exactions are imposed on an individualized basis or via a comprehensive legislative scheme.[20] This

18. It should be noted that unrebutted evidence introduced at trial casts substantial doubt on this characterization in any event. For example, testimony from William A. Marsh, a land-use planner employed by Salt Lake County for over twenty-eight years, elicited the following information:

> Q. Okay. How does the county determine how much that developer then dedicates; in other words, what the half width actually is?
> A. When the subdivision application is processed, the recommendation is sent out. In the case of 3500 South, where it's a state highway, it goes to the county transportation engineer and to UDOT.
> Q. Okay. And who makes that determination as to what the half width is?
> A. It would be based on the recommendations that come back from those agencies.
> Q. Okay. So at any given moment we can't, say, look in the book and see what that half width determination is?
> A. We have the map that guides us, but until we get the final written recommendation we don't know for sure.

Such testimony belies the County's assurances that there is no discretion involved in assessing its road-width dedication requirements.

19. There has been some confusion about whether *Nollan* and *Dolan* imposed a new form of heightened scrutiny. In *Nollan*, the Court stated that "our verbal formulations in the takings field have generally been quite different" from "those applied to due process or equal protection claims" because "[w]e have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that 'the State "*could rationally have decided*" that the measure adopted might achieve the State's objective.' " 483 U.S. at 834 n. 3, 107 S.Ct. at 3147 n. 3 (emphasis in original) (citations omitted). Therefore, *Nollan* and *Dolan* could be interpreted as merely clarifying the heightened scrutiny that already applied to regulatory takings claims. *See, e.g., Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 258 n. 18 (Utah Ct.App.1998) ("[T]he takings analysis ... adds the word 'substantially' before 'advance.' Thus, this standard appears to be more stringent than the standard against which we measured the substantive due process validity of the ordinance."). However, the Court's subsequent warning about being "particularly careful about the adjective" of "substantial" when an "actual conveyance of property" is at issue, *Nollan*, 483 U.S. at 841, 107 S.Ct. at 3150–51, implies that such claims are subject to increased scrutiny beyond that applied to garden-variety land-use regulations. As discussed in Note 20, courts and commentators have disagreed about what *type* of cases invoke *Nollan/Dolan* scrutiny. Most, however, agree that *Nollan* and *Dolan* do impose some sort of heightened scrutiny. *See, e.g., San Remo Hotel v. City & County of San Francisco*, 27 Cal.4th 643, 117 Cal.Rptr.2d 269, 41 P.3d 87, 102 (2002) (" 'Thus in *Nollan*, the rule that [physical occupations are per se takings] is transformed, in the context of a development application, into a rule of heightened scrutiny to ensure that a required development dedication is not a mere pretext to obtain or otherwise physically invade property without just compensation.' ") (citation omitted). *See also* Lee Anne Fennell, *Hard Bargains & Real Steals: Land Use Exactions Revisited*, 86 Iowa L.Rev. 1, 4, 9–12 (2000) (arguing that "wholesale application of *Dolan* to regulatory takings jurisprudence would abruptly dismantle nearly seventy-five years of zoning law").

20. It must be acknowledged that the scope of the *Nollan/Dolan* analysis is unsettled. In other words, because both *Nollan* and *Dolan* were decided in the context of forced dedications of real property administered, according to the Court, on an individualized, adjudicative basis, it is unclear whether one or both of those conditions must exist for *Nollan/Dolan* heightened scrutiny to apply. *See, e.g.*, Fennell, *Hard Bargains*, 86 Iowa L.Rev. at 10–11 (stating that two uncertainties exist after *Nollan* and *Dolan* (1) "whether *Dolan's* requirement of rough proportionality applies when land use 'conditions' are not selectively imposed on individual landowners, but are instead embedded in legislative enactments" and (2) whether *Nollan* and *Dolan*, which "both involved actual concessions of land" apply to "other kinds of concessions (such as cash payments or the provision of unrelated amenities)"). *See also Rogers Mach. Inc. v Washington County*, 181 Or.App. 369, 45 P.3d 966, 976 (2002) ("In the eight years since *Dolan* was decided, no consensus has emerged among lower courts on [the above] questions and, so far, the Supreme Court has declined to grant certiorari in cases that might have provided further guidance."), *review denied*, 334 Or. 492, 52 P.3d 1057 (2002), *cert. denied*, 538 U.S. 906, 123 S.Ct. 1482, 155 L.Ed.2d 225 (2003). *See also, e.g., San*

is so for at least two reasons. First, "[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 115 S.Ct. 2268, 2268–69, 132 L.Ed.2d 273 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). For example, "[a] city council can take property just as well as a planning commission can." [21] *Id.* at 1118, 115 S.Ct. at 2269. *See also Amoco Oil Co. v. Village of Schaumburg*, 277 Ill.App.3d 926, 214 Ill.Dec. 526, 661 N.E.2d 380, 390 (1995) ("[A] municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property"), *cert. denied*, 519 U.S. 976, 117 S.Ct. 413, 136 L.Ed.2d 325 (1996); *McClure v. City of Springfield*, 175 Or.App. 425, 28 P.3d 1222, 1224 (2001) (noting parties' stipulation that "the city's enactment of dedication requirements as an ordinance did not relieve it of the obligation to make particularized findings showing that any resulting exactions were roughly proportional to the impact of the proposed development"), *review denied*, 334 Or. 327, 52 P.3d 435 (2002)

Remo Hotel, 117 Cal.Rptr.2d 269, 41 P.3d at 102–05 (discussing scope of *Nollan/Dolan* analysis), *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695–98 (Colo.2001) (en banc) (same), *Town of Flower Mound*, 71 S.W.3d at 31–35 (same). Inna Reznik, *The Distinction Between Legislative & Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L.Rev. 242, 252 (2000) (cataloguing the pervasive confusion among lower courts attempting to interpret and apply *Dolan*).

21. Noting the conflict among lower courts over "whether *Dolan's* test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature," Justice Thomas concluded:

> It is hardly surprising that some courts have applied *Dolan's* rough proportionality test even when considering a legislative enactment. [T]he general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Parking Ass'n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116, 115 S.Ct. 2268, 2268–69, 132 L.Ed.2d 273 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari).

¶ 57 Second, it is not always easy to tell the difference between an individualized, adjudicative decision and a "uniformly imposed" legislative scheme. This ambiguity is manifest in *Dolan* itself, where the majority characterized the city's action as an "adjudicative decision" without further explanation, while Justice Souter, in dissent, pointed out that "the permit conditions were imposed pursuant to [the city's] Community Development Code." [22] *Dolan v. City of Tigard*, 512 U.S. 374, 413 n. *, 114 S.Ct. 2309, 2331 n. * (1994) (Souter, J., dissenting). Distinguishing between adjudicative and legislative action is made even more difficult because "local governments are not structured under strict separation of powers principles" and "the nature of the land use decision-making process relies on flexibility and discretion." Inna Reznik, *The Distinction Between Legislative & Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L.Rev. 242, 257 (2000).[23] Notwithstanding these uncertainties, it must be concluded that all forced dedications of property are subject to *Nollan/Dolan* scrutiny. This conclusion is premised on the United States Supreme Court's well-settled takings jurisprudence

22. Specifically, the City of Tigard imposed the floodplain exaction pursuant to its Master Drainage Plan, codified in its Community Development Code and required by the State of Oregon which required land dedications from all permit applicants seeking to develop land within and adjacent to the 100-year floodplain. *Dolan*, 512 U.S. at 377–79, 114 S.Ct. at 2313–14. Of course these facts are strikingly similar to the ones before us, where the County, acting pursuant to its Transportation Master Plan, required dedications from all landowners seeking to develop property abutting 3500 South Street. It seems therefore that the County cannot fairly characterize the scheme in *Dolan* as "ad hoc" and discretionary" without so characterizing its own.

23. Ms. Reznik astutely points out that some exactions "are somewhere in the middle of adjudicative and legislative because the legislature [may give] some guidelines [while] the administrative body retain[s] considerable discretion as well." Reznik, *The Distinction Between Legislative & Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L.Rev. at 266.

holding that physical invasions, occupations, or mandated conveyances of real property are entitled to special treatment. As the Court stated in *Nollan v. California Coastal Commission*,

> our cases describe the condition for abridgement of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the *actual conveyance* of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

483 U.S. 825, 841, 107 S.Ct. 3141, 3150–51, 97 L.Ed.2d 677 (1987) (alteration and first emphasis in original). The Court has "repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property."'" *Id.* at 831, 107 S.Ct. at 3145 (alteration in original) (citations omitted). Anything less than *Nollan/Dolan* scrutiny, at least when an actual conveyance of property is at issue, falls short of adequately protecting these rights. Accordingly, this opinion now addresses the question of whether the County's uncompensated dedication requirement passes muster under *Nollan*.

A. *Nollan* and the "Essential Nexus"

¶ 58 Under *Nollan*, "[a court] must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the [governmental entity]." *Dolan*, 512 U.S. at 386, 114 S.Ct. at 2317 (quoting *Nollan*, 483 U.S. at 836–37, 107 S.Ct. at 3148). In doing so here, it is appropriate to review the facts of *Nollan*.

¶ 59 The Nollans planned to replace their beachfront bungalow with a three-bedroom house. When they applied to the California Coastal Commission for a development permit, the Nollans were told the permit would be denied unless they agreed to a public easement across their beachfront lot. The Commission argued that the easement was necessary to advance legitimate state interests such as "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." *Id.* at 835, 107 S.Ct. at 3148. The Court assumed, without deciding, that the above interests were legitimate and agreed with the Commission that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Id.* at 836, 107 S.Ct. at 3148. Thus, if the "Commission could have exercised its police power . . . to forbid construction of the house altogether," it may, in the alternative, impose permit conditions—for example, height or width restrictions—that would further the legitimate state interest of protecting "the public's ability to see the beach." *Id.*

¶ 60 However, the Court went on to explain that "[t]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837, 107 S.Ct. at 3148. Such was the case in *Nollan*. The Court found it

> quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach, created by the new house[,] how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house.

Id. at 838–39, 107 S.Ct. at 3149. Thus, "the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Id.* at 837, 107 S.Ct. at 3149. Such a restriction "is not a valid regulation of land use but

'an out-and-out plan of extortion.'" *Id.* (citation omitted).

¶ 61 Having reviewed the holding and rationale underlying *Nollan*, this opinion now turns to the facts of the instant case. The County devotes the majority of its takings analysis to arguing that *Nollan* and *Dolan* are inapplicable to this case. In so doing, the County fails to articulate, in the alternative, the legitimate state interests in support of its dedication requirements, arguing only in passing that "[s]uch a uniform scheme is fundamental to ensuring that community development occurs in accordance with sensible long-range transportation planning."[24] Following the lead of the *Nollan* Court, it may be assumed that the County's traffic goals are a legitimate governmental interest.[25] *See Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 255 (Utah Ct.App.1998) ("'[I]t is clear that the flow of traffic is a legitimate concern of a municipal legislative body in its enactment of zoning regulations.'") (quoting Kenneth H. Young, Anderson's American Law of Zoning § 3A.04 (4th ed.1996)). Nevertheless, the validity of the interest does not, by itself, justify imposing the entire cost of realizing that goal upon BAM and other landowners whose property abuts 3500 South. *See* 8A Nichols, Eminent Domain § 17.01, at 17–6, 17–7 (2002) (articulating the reasons "it makes a great deal of sense for a governmental agency to attempt to acquire, or at least reserve, land for major roads before an area develops" but nevertheless noting that "the need for reducing the cost of acquiring public right-of-way ... cannot override the constitutional guarantee that an individual's property rights be protected"). Rather, the County must demonstrate an "essential nexus" between that interest and the roadway dedication requirements it imposed upon BAM. Although the County fails to undertake this demonstration in its brief, the record reveals unrebutted evidence, introduced at trial, that construction of the Westridge Meadows subdivision, consisting of forty-four single-family units, would increase traffic flow along 3500 South only "by approximately three to four percent."[26]

¶ 62 Clearly, there is an "essential nexus" between the problem of increased traffic

24. The Commission advanced a similar argument in *Nollan*, pointing out that it had already similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property.

483 U.S. at 829, 107 S.Ct. at 3144. The Commission argued that such a scheme was necessary as "part of a comprehensive program to provide continuous public access along [the beach] as the lots undergo development or redevelopment." *Id.* at 841, 107 S.Ct. at 3151. The Court was unmoved, holding that such a justification was "unrelated to land-use regulation" and was "simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast." *Id.* The Court continued:

> The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose...."

Id. at 841–42, 107 S.Ct. at 3151.

25. To this end, the County argues that "under BAM's view of constitutional law, road-width requirements for new construction along major traffic corridors would vary radically from parcel-to-parcel, depending on the size, usage, and other impact characteristics of each individual parcel." This would only be true if BAM was challenging the County's authority to require road-width dedications as a condition of development. BAM's argument, however, is that while the County surely has the authority to require such dedications, it does not have the authority to require them for free. Contrary to the County's contention, BAM's view would have no effect on the uniformity of road width along 3500 South—it would just mean that the cost of such uniformity would be borne by the public, not by BAM alone.

26. This conclusion is based on a study promulgated by the Institute of Transportation Engineers, which estimates that the typical residential dwelling generates an average of ten car trips per day. Thus, Westridge Meadows, consisting of forty-four units, would generate approximately 440 additional trips per day on 3500 South, the nearest major street to which Westridge Meadows residents would have vehicular access. Evidence at trial showed that, in 1997, about 13,000 cars traveled on 3500 South per day. Therefore, the 440 additional trips generated by the Westridge Meadows subdivision would increase the 1997 estimate by, at most, three or four percent.

along 3500 South, insofar as attributable to the subdivision, and the solution of property dedication so that 3500 South can eventually be widened. The County, understandably, must project and prepare for the inevitable increase in traffic along state highways. Should widening of 3500 South become necessary in the future, the County ideally would be able to accomplish this without having to buy, only to then demolish and remove, existing structures. BAM's subdivision, as acknowledged by both sides at trial, will necessarily contribute, albeit a relatively small amount, to increased traffic along 3500 South and the eventual need for a wider road. Thus, the County's roadway dedication requirements are connected to the goal of insuring that the County will be able to fulfill that need. Having determined that an essential nexus exists between a legitimate state interest and the required condition of approval, this opinion now addresses whether the required dedication is sufficiently related in both nature and extent to the impact of the proposed development.

B. *Dolan* and Rough Proportionality

¶ 63 *Dolan* requires this court to determine whether the exactions demanded by the County bear a "rough proportionality" to the "projected impact of [BAM's] proposed development." 512 U.S. at 388–91, 114 S.Ct. at 2318–19. In *Dolan*, the landowner applied for a building permit to expand her plumbing and electrical supply store. *See id.* at 379, 114 S.Ct. at 2313. The city responded that, in exchange for the permit, the landowner would be required to dedicate "the portion of her property lying within the 100–year floodplain for improvement of a storm drainage system ... and that she dedicate an additional 15–foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway" *Id.* at 379–80, 114 S.Ct. at 2314. As justification for these exactions, the city argued, first, that the floodplain dedication was necessary to alleviate the "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin." *Id.* at 382, 114 S.Ct. at 2315. Second, the city argued that "creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation 'could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion'" caused, at least in part, by the proposed development. *Id.* at 381–82, 114 S.Ct. at 2314.

¶ 64 After determining that the above justifications satisfied the "essential nexus" prong of *Nollan*, the Court was left with the question of "whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit." *Id.* at 389, 114 S.Ct. at 2318. After reviewing "representative decisions" by State courts addressing this question, the Court adopted the "rough proportionality" test.[27] *Id.* at 389–91, 114 S.Ct. at

27. As support for the adoption of this test, the United States Supreme Court cited *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979) (*Call I*), *modified on reh'g*, 614 P.2d 1257 (Utah 1980) (*Call II*), the only Utah case of which I am aware that addressed the constitutionality of exactions in the form of forced dedications of property. In *Call I*, our Supreme Court addressed the validity of a city ordinance that required subdividers to dedicate seven percent of their land, or pay the cash equivalent, as a condition to development approval. The Court originally upheld the ordinance against a takings challenge because the dedication, which was to be used for "'flood control and/or parks and recreation facilities,'" bore a "reasonable relationship to the needs created by the subdivision." *Id.* at 220. This was so, the Court held, even though the dedication requirements would necessarily benefit the whole community along with the individual subdivision. *See id.*

After granting the landowner's petition for rehearing, however, the Utah Supreme Court held that "disposition of this issue as a matter of law [is] inappropriate," *Call II*, 614 P.2d at 1258, "without plaintiffs being given the opportunity to present evidence to show that the dedication required of them had no reasonable relationship to the needs for flood control or parks and recreation facilities created by their subdivision, if any." *Id.* at 1259. Like the United States Supreme Court, I think the "reasonable relationship" test is virtually equivalent to the "rough proportionality" test, and thus presents no issue of inconsistency between the precedents of the United States and Utah Supreme Courts. *See Dolan*, 512 U.S. at 391, 114 S.Ct. at 2319 ("[T]he 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm[,] . . . [b]ut we do not adopt it as such partly because the term . . seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny

2318–19. In other words, "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391, 114 S.Ct. at 2319–20. Under this test, the Court determined that the city had failed to demonstrate that its permit conditions bore a "rough proportionality" to the "projected impact of [the landowner's] proposed development." *Id* at 388–95, 114 S.Ct. at 2318–22.

¶ 65 Regarding the floodplain dedication, the Court acknowledged that "[i]t is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property." *Id.* at 392, 114 S.Ct. at 2320. "Therefore, keeping the floodplain open and free from development would likely confine the pressures . created by petitioner's development." *Id* at 393, 114 S.Ct. at 2320. The city, however, "demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property . for its greenway system." *Id.* The city failed to explain "why a public greenway, as opposed to a private one, was required in the interest of flood control" *Id*

¶ 66 Further, "[w]ith respect to the pedestrian/bicycle pathway," the Court accepted the city's finding that "the larger retail sales facility proposed by petitioner [would] increase traffic" in the downtown area by an estimated "435 additional trips per day" *Id* at 395, 114 S.Ct at 2321 The Court also acknowledged that "[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use" *Id*

¶ 67 Nevertheless, the Court held that the city's conclusory statement that "the creation of the pathway 'could offset some of the traffic demand'" fell far short of "demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development *reasonably relate* to the city's requirement for a dedication of the pedestrian/bicycle pathway easement" *Id* at 395, 114 S.Ct. at 2321–22 (emphasis added) The Court concluded that while

> [t]he city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"

under the Equal Protection Clause of the Fourteenth Amendment") Indeed, the Court itself used the two terms interchangeably *See id* at 391, 395, 114 S Ct at 2319, 2321

We are, however, presented with a potential conflict between state and federal law insofar as *Call II*, decided before *Nollan* and *Dolan*, appears to place the burden on the party challenging the dedication to show that it "had no reasonable relationship to the needs created by their subdivision' *Call II* 614 P 2d at 1259, while *Dolan* places this burden on the entity of local government *See Dolan*, 512 U S at 391 n 8 114 S Ct at 2320 n 8 (While "in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation," the burden is on the government to 'justify the required dedication" when it makes an adjudicative decision to condition [an] application for a building permit on an individual parcel') It must be noted, however, that the landowner in *Call II*, at the request of the city, paid a fee instead of actually conveying his property to the city, *Call I*, 606 P 2d at 218, so the cases are distinguishable on that basis Additionally, in *Call v City of West Jordan*, 727 P 2d 180 (1986) (*Call III*), the Court upheld a trial court order which placed the burden of producing evidence 'regarding the reasonableness of the impact fee' on the city *Id* at 182 In so doing, the Court indicated that *Call II* should be interpreted in light of the Court's subsequent decision in *Banberry Development Corp v South Jordan City*, 631 P 2d 899 (Utah 1981) which states:

> Since the information that must be used to assure that subdivision fees are within the standard of reasonableness is most accessible to the municipality that body should disclose the basis of its calculations to whoever challenges the reasonableness of its subdivision or hookup fees Once that is done the burden of showing failure to comply with the constitutional standard of reasonableness in this matter is on the challengers

Id at 904 *See also Call III* 727 P 2d at 181

However, where the burden of proof ultimately falls should not affect the outcome here because even if the burden properly rests on BAM it has presented sufficient evidence that the County's dedication requirement does not have the requisite relationship—whether couched in terms of reasonableness or rough proportionality—to the impact of BAM's subdivision

Id. at 396, 114 S.Ct. at 2322 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922)) (second alteration in original).

¶ 68 The justifications advanced in favor of the County's highway dedication requirements in this case suffer from the same shortcomings as those identified in *Dolan*. As acknowledged earlier in this opinion, the County's goal of "ensuring that community development occurs in accordance with sensible long-range transportation planning" qualifies as a legitimate public purpose. However, the County has not demonstrated why, in the interest of transportation planning, BAM must convey the right-of-way to the County outright, instead of, for example, implementing a set-back requirement that would prohibit BAM and similarly situated property owners from erecting structures that could complicate the future widening of 3500 South.

¶ 69 Similarly, the anticipated three to four percent increase in traffic congestion caused by the subdivision does not, by itself, justify the County's dedication requirement, which in essence requires BAM to pay for 100 percent of the cost of the County's long-range transportation goal of widening 3500 South, at least as to the portion of 3500 South that abuts BAM's property. Any argument the County makes to the contrary is fatally hobbled by its repeated assertions that "the County highway-dedication requirement operates independently of any unique characteristics or proposed uses of specific parcels to which it applies." While it is clear that the County employed such reasoning to convince the court that *Nollan* and *Dolan* do not apply to this case, it still leaves the County a "far cry" from the "individualized determination" required by *Dolan*. *Id.* at 391, 114 S.Ct. at 2319. *See* 1 Nichols, Eminent Domain § 1.42[2], at 1–239 (3d ed 2002) ("[W]here the need for a road is substantially generated by public traffic demands, rather than by the proposed development, eminent domain must be used rather than the police power.").[28] *Cf Sparks v. Douglas County*, 127 Wash.2d 901, 904 P.2d 738, 741, 746 (1995) (upholding county dedication requirements where proposed development "would approximately double traffic" along adjacent streets).

¶ 70 Under *Dolan*, the County "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391, 114 S.Ct. at 2319–20. There appears to be no such evidence in the record before us. While it is agreed that community development and transportation planning are worthy goals, the County should not be permitted to implement these goals in an unconstitutional fashion by avoiding the compensation requirement.[29] "Rather, [the County] is free to advance its comprehensive program, if it wishes, by using its power of eminent domain for this public purpose, but if it wants [a right-of-way] across [BAM's] property, it must pay for it." *Nollan*, 483 U.S. at 842–43, 107 S.Ct. at 3151 (citations and quotations omitted).

CONCLUSION

¶ 71 The County's exaction requiring dedication of a fifty-three-foot right-of-way along 3500 South Street constitutes a taking of BAM's property under both the Fifth Amendment of the United States Constitution and Article I, Section 22, of the Utah Constitution. BAM is entitled to just compensation for its property, and this court should reverse and remand for determination

28. Although *Dolan* does not *require* "precise mathematical calculation," it does not preclude a mathematical inquiry, and the Court in fact considered such evidence in *Dolan*. 512 U.S. at 391, 395, 114 S.Ct. at 2319, 2321. In any event, mathematical calculations, while not required, are at least one way to show an exaction is not roughly proportional to the impact of the proposed development. *See Art Piculell Group v. Clackamas County*, 142 Or.App. 327, 922 P.2d 1227, 1235 (1996) ("[*Dolan*] in fact requires *some* quantification [and thus] such information although not necessarily determinative may be considered.") (emphasis in original).

29. It is acknowledged that the County may validly administer these goals via its dedication ordinance. Nevertheless, the County should not be permitted to short circuit the just compensation requirement by reading its ordinance to require landowners to dedicate their property for free

of an appropriate award.[30] Such award should reflect unrebutted evidence that the County's dedication requirement caused BAM to lose two lots that it could have otherwise developed. *See, e.g., City of Hildale v. Cooke,* 2001 UT 56,¶ 19, 28 P.3d 697 (" '[Land]owners must be put in as good a position money wise as they would have occupied had their property not been taken.' ") (quoting *State v. Noble,* 6 Utah 2d 40, 43, 305 P.2d 495, 497 (1957)).

2004 UT App 44

Barry KELLY, individually and in the right of Wapiti Heights, L.L.C., a Utah limited liability company, Plaintiff and Appellant,

v.

HARD MONEY FUNDING, INC., a Utah corporation; each assignee of a beneficial interest of a certain trust deed; Gary A. Weston, as trustee under a certain trust deed; M.V.I.; JJ Associates; and V.C.I., Defendants and Appellees.

No. 20020854-CA.

Court of Appeals of Utah.

March 4, 2004.

Background: Member of limited liability company brought quiet title and declaratory judgment action, on behalf of company and in his individual capacity, against lender who held security interest in properties once owned by the company. The Third District Court, Salt Lake Department, William B. Bohling, J., granted lender's motion for summary judgment, and denied member's motion to amend his complaint. Member appealed.

Holdings: The Court of Appeals, Norman H. Jackson, J., held that:

(1) member did not have standing to bring quiet title action against lender on 12 of company's properties that were transferred at foreclosure sale;

(2) misnomer of grantee in warranty deed transferring seven of company's properties did not invalidate the transfer; and

(3) trial court abused its discretion in denying member's motion to amend his complaint to add interference with contractual relations and breach of fiduciary duty claims against lender.

Affirmed in part, and reversed and remanded in part.

Russell W. Bench, J., concurred in the result.

1. Appeal and Error ⇐761

Declaratory Judgment ⇐392.1

Argument by member of limited liability company in appeal of quiet title and declaratory judgment action against lender who had security interest in properties once owned by company, that purported involvement by lender in scheme of other members of company to defraud company should act as grounds to subordinate lender's interest in the properties to member's own claims against other members, would not be addressed on appeal, though member alluded to argument in his various discussions of the alleged involvement of lender in the various machinations of other members, where member had not specifically argued subordination issue in his appellate brief, and did not pro

30. To the extent BAM has successfully persuaded me of the fundamental soundness of its position, that success should not be attributed, in any degree, to its counsel's unrestrained and unnecessary use of the bold, underline, and "all caps" functions of word processing or his repeated use of exclamation marks to emphasize points in his briefs. Nor are the briefs he filed in this case unique. Rather, BAM's counsel has regularly employed these devices in prior appeals to this court. While I appreciate a zealous advocate a much as anyone, such techniques, which reall amount to a written form of shouting, are simpl inappropriate in an appellate brief. It is cour terproductive for counsel to litter his brief wit burdensome material such as "WRONG WRONG ANALYSIS! WRONG RESUL WRONG! WRONG! WRONG!" It is also a odds with Rule 24(j) of the Utah Rules of Appe late Procedure.

APPENDIX #2

Nollan vs California Coastal Commission
107 SCt 3141 (United States Supreme Court 1987)

usual and raises special concern.[5] At |824least, where a State permits the execution of a minor, great care must be taken to ensure that the minor truly deserves to be treated as an adult. A specific inquiry including "age, actual maturity, family environment, education, emotional and mental stability, and ... prior record" is particularly relevant when a minor's criminal culpability is at issue. See *Fare v. Michael C.*, 442 U.S. 707, 734, n. 4, 99 S.Ct. 2560, 2576, n. 4, 61 L.Ed.2d 197 (1979) (POWELL, J., dissenting). No such inquiry occurred in this case. In every realistic sense Burger not only was a minor according to law, but clearly his mental capacity was subnormal to the point where a jury reasonably could have believed that death was not an appropriate punishment. Because there is a reasonable probability that the evidence not presented to the sentencing jury in this case would have affected its outcome, Burger has demonstrated prejudice due to counsel's deficient performance.

III

As I conclude that counsel's performance in this case was deficient, and the deficiency may well have influenced the sentence that Burger received, I would vacate Burger's death sentence and remand for resentencing.

charges of ineffective assistance of counsel is likely to have a significant "chilling effect" on the willingness of experienced lawyers to undertake the defense of capital cases. See *ante*, at 3118, n. 2. In this case, however, I conclude that the facts and circumstances that no one now disputes clearly show that counsel made a serious mistake of judgment in failing fully to develop and introduce mitigating evidence that the Court concedes was "relevant" and that the jury would have been compelled "to consider." See *ante*, at 3123, n. 7.

5. We noted in *Eddings v. Oklahoma* that "[e]very State in the country makes some separate provision for juvenile offenders." 455 U.S., at 116, n. 12, 102 S.Ct. 877, n. 12 (citing *In re Gault*, 387 U.S. 1, 14, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967)). Of the 37 States that have enacted capital-punishment statutes since this Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), 11 prohibit the execution of persons under 18 at the time of the offense. Three States impose a prohibition at age 17, and Nevada sets its limit at age 16. Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleveland State L.Rev. 363, 368–369, and nn. 33–36 (1986). Of the States permitting imposition of the death penalty on juveniles, over half of them explicitly denominate youth as a mitigating factor. The American Law Institute's Model Penal Code capital-punishment statute states an exclusion for defendants "under 18 years of age at the time of the commission of the crime." § 210.6(1)(d) (1980). The Institute reasons "that civilized societies will not tolerate the spectacle of execution of children, and this opinion is confirmed by the American experience in punishing youthful offenders." *Id.*, Comment, p. 133. In 1983, the American Bar Association adopted a resolution stating that the organization "oppo[ses], in principle, the imposition of capital punishment on any person for an offense committed while that person was under the age of 18." See ABA Opposes Capital Punishment for Persons under 18, 69 A.B.A.J. 1925 (1983).

International opinion on the issue is reflected in Article 6 of the International Covenant on

483 U.S. 825, 97 L.Ed.2d 677

|825James Patrick NOLLAN, et ux., Appellant

v.

CALIFORNIA COASTAL COMMISSION.

No. 86–133.

Argued March 30, 1987.

Decided June 26, 1987.

Property owners brought action against California Coastal Commission seeking writ of mandate. The Commission had imposed as a condition to approval of

rebuilding permit requirement that owners provide lateral access to public to pass and repass across property. The Superior Court, Ventura County, William L. Peck, J., granted peremptory writ of mandate, and the Commission appealed. The California Court of Appeal, Abbe, J., 177 Cal.App.3d 719, 223 Cal.Rptr. 28, reversed and remanded with directions. Appeal was taken. The Supreme Court, Justice Scalia, held that Commission could not, without paying compensation, condition grant of permission to rebuild house on property owners' transfer to public of easement across beachfront property.

Reversed.

Justice Brennan filed a dissenting opinion in which Marshall joined.

Justice Blackmun filed a dissenting opinion.

Justice Stevens filed a dissenting opinion in which Justice Blackmun joined.

1. **Eminent Domain** ⇐2(1.2)

Although outright taking of uncompensated, permanent, public-access easement violates Fifth Amendment taking clause, conditioning property owners' rebuilding permit on granting of easement can be allowed for land use regulation if condition substantially furthers governmental purposes that justify denial of permit. U.S.C.A. Const.Amend. 5.

2. **Eminent Domain** ⇐2(10)

California Coastal Commission could not, without paying compensation, condition grant of permission to rebuild house on property owners' transfer to public of easement across beachfront property. U.S.C.A. Const.Amend. 5.

Syllabus *

The California Coastal Commission granted a permit to appellants to replace a small bungalow on their beachfront lot with a larger house upon the condition that they allow the public an easement to pass across their beach, which was located between two public beaches. The County Superior Court granted appellants a writ of administrative mandamus and directed that the permit condition be struck. However, the State Court of Appeal reversed, ruling that imposition of the condition did not violate the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment.

Held:

1. Although the outright taking of an uncompensated, permanent, public-access easement would violate the Takings Clause, conditioning appellants' rebuilding permit on their granting such an easement would be lawful land-use regulation if it substantially furthered governmental purposes that would justify denial of the permit. The government's power to forbid particular land uses in order to advance some legitimate police-power purpose includes the power to condition such use upon some concession by the owner, even a concession of property rights, so long as the condition furthers the same govern-

Civil and Political Rights and the American Convention on Human Rights. See United Nations, Human Rights, A Compilation of International Instruments 9 (1983). See also Weissbrodt, United States Ratification of the Human Rights Covenants, 63 Minn.L.Rev. 35, 40 (1978). Both prohibit the execution of individuals under the age of 18 at the time of their crime. The United States is not a party to either of these treaties, but at least 73 other nations have signed or ratified the International Covenant. See Weissbrodt, *supra*. All European countries forbid imposition of the death penalty on those under 18 at the time of their offense. Streib, *supra*, at 389 (citing Amnesty International, The Death Penalty (1979)).

The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

mental purpose advanced as justification for prohibiting the use. Pp. 3145–3148.

2. Here the Commission's imposition of the access-easement condition cannot be treated as an exercise of land-use regulation power since the condition does not serve public purposes related to the permit requirement. Of those put forth to justify it—protecting the public's ability to see the beach, assisting the public in overcoming a perceived "psychological" barrier to using the beach, and preventing beach congestion—none is plausible. Moreover, the Commission's justification for the access requirement unrelated to land-use regulation—that it is part of a comprehensive program to provide beach access arising from prior coastal permit decisions—is simply an expression of the belief that the public interest will be served by a continuous strip of publicly accessible beach. Although the State is free to advance its "comprehensive program" by exercising its eminent domain power and paying for access easements, it |826 cannot compel coastal residents alone to contribute to the realization of that goal. Pp. 3148–3150.

177 Cal.App.3d 719, 223 Cal.Rptr. 28 (1986), reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 3151. BLACKMUN, J., filed a dissenting opinion, *post*, p. 3163. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 3163.

Robert K. Best, Sacramento, Cal., for appellants.

Andrea Sheridan Ordin, Los Angeles, Cal., for appellee.

|827 Justice SCALIA delivered the opinion of the Court.

James and Marilyn Nollan appeal from a decision of the California Court of Appeal ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. 177 Cal.App.3d 719, 223 Cal.Rptr. 28 (1986). The California court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. *Ibid.* We noted probable jurisdiction. 479 U.S. 913, 107 S.Ct. 312, 93 L.Ed.2d 286 (1986).

I

The Nollans own a beachfront lot in Ventura County, California. A quarter-mile north of their property is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as "the Cove," lies 1,800 feet south of their lot. A concrete seawall approximately eight feet high separates the beach portion of the Nollans' property from the rest of the lot. The historic mean high tide line determines the lot's oceanside boundary.

The Nollans originally leased their property with an option to buy. The building on the lot was a small bungalow, totaling 504 square feet, which for a time they rented to summer vacationers. After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.

|828 The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so, under Cal.Pub.Res. Code Ann. §§ 30106, 30212, and 30600 (West 1986), they were required to obtain a coastal de-

velopment permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that their application had been placed on the administrative calendar, and that the Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side. This would make it easier for the public to get to Faria County Park and the Cove. The Nollans protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement. App. 31, 34.

On June 3, 1982, the Nollans filed a petition for writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition. They argued that the condition could not be imposed absent evidence that their proposed development would have a direct adverse impact on public access to the beach. The court agreed, and remanded the case to the Commission for a full evidentiary hearing on that issue. *Id.*, at 36.

On remand, the Commission held a public hearing, after which it made further factual findings and reaffirmed its imposition of the condition. It found that the new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public "psychologically ... from realizing a stretch of coastline exists nearby that they have every right |829to visit." *Id.*, at 58. The new house would also increase private use of the shorefront. *Id.*, at 59. These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront." *Id.*, at 65–66. Therefore the Commission could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property. The Commission also noted that it had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property. *Id.*, at 47–48.

The Nollans filed a supplemental petition for a writ of administrative mandamus with the Superior Court, in which they argued that imposition of the access condition violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. The Superior Court ruled in their favor on statutory grounds, finding, in part to avoid "issues of constitutionality," that the California Coastal Act of 1976, Cal.Pub.Res. Code Ann. § 30000 *et seq.* (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea. App. 419. In the court's view, the administrative record did not provide an adequate factual basis for concluding that replacement of the bungalow with the house would create a direct or cumulative burden on public access to the sea. *Id.*, at 416–417. Accordingly, the Superior Court granted the writ of mandamus and directed that the permit condition be struck.

The Commission appealed to the California Court of Appeal. While that appeal was pending, the Nollans satisfied |830the

condition on their option to purchase by tearing down the bungalow and building the new house, and bought the property. They did not notify the Commission that they were taking that action.

The Court of Appeal reversed the Superior Court. 177 Cal.App.3d 719, 223 Cal. Rptr. 28 (1986). It disagreed with the Superior Court's interpretation of the Coastal Act, finding that it required that a coastal permit for the construction of a new house whose floor area, height or bulk was more than 10% larger than that of the house it was replacing be conditioned on a grant of access. *Id.*, at 723–724, 223 Cal.Rptr., at 31; see Cal.Pub.Res.Code Ann. § 30212. It also ruled that the requirement did not violate the Constitution under the reasoning of an earlier case of the Court of Appeal, *Grupe v. California Coastal Comm'n*, 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (1985). In that case, the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional. 177 Cal. App.3d, at 723, 223 Cal.Rptr., at 30–31; see *Grupe, supra*, 166 Cal.App.3d, at 165–168, 212 Cal.Rptr., at 587–590; see also *Remmenga v. California Coastal Comm'n*, 163 Cal.App.3d 623, 628, 209 Cal.Rptr. 628, 631, appeal dism'd, 474 U.S. 915, 106 S.Ct. 241, 88 L.Ed.2d 250 (1985). The Court of Appeal ruled that the record established that that was the situation with respect to the Nollans' house. 177 Cal.App.3d, at 722–723, 223 Cal.Rptr., at 30–31. It ruled that the Nollans' taking claim also failed because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property. *Id.*, at 723, 223 Cal.Rptr., at 30; see *Grupe, supra*, 166 Cal.App.3d, at 175–176, 212 Cal.Rptr., at 595–596. Since, in the Court of Appeal's view, there was no statutory or constitutional obstacle to imposition$_{831}$ of the access condition, the Superior Court erred in granting the writ of mandamus. The Nollans appealed to this Court, raising only the constitutional question.

II

[1] Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as Justice BRENNAN contends) "a mere restriction on its use," *post*, at 3155, n. 3, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. J. Sackman, 1 Nichols on Eminent Domain § 2.1[1] (Rev. 3d ed. 1985), 2 *id.*, § 5.01[5]; see 1 *id.*, § 1.42[9], 2 *id.*, § 6.14. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S.Ct. 3164, 3175, 73 L.Ed.2d 868 (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979). In

Loretto we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 U.S., at 432–433, n. 9, 102 S.Ct., at 3174–3175, n. 9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public 832 benefit or has only minimal economic impact on the owner," *id.*, at 434–435, 102 S.Ct., at 3175–3176. We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[1]

Justice BRENNAN argues that while this might ordinarily be the case, the California Constitution's prohibition on any individual's "exclu[ding] the right of way to [any navigable] water whenever it is required for any public purpose," Art. X, § 4, produces a different result here. *Post*, at 3154; see also *post*, at 3158, 3159. There are a number of difficulties with that argument. Most obviously, the right of way sought here is not naturally described as one *to* navigable water (from the street to the sea) but *along* it; it is at least highly questionable whether the text of the California Constitution has any prima facie application to the situation before us. Even if it does, however, several California cases suggest that Justice BRENNAN's interpretation of the effect of the clause is erroneous, and that to obtain easements of access across private property the State must proceed through its eminent domain power. See *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 260, 90 P. 532, 534–535 (1907); *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 185, 50 P. 277, 286 (1897); *Heist v. County of Colusa*, 163 Cal.App.3d 841, 851, 213 Cal.Rptr. 278, 285 (1984); *Aptos Seascape Corp. v. Santa Cruz*, 138 Cal.App.3d 484, 505–506, 188 Cal.Rptr. 191, 204–205 (1982). (None of these cases specifically addressed 833 the argument that Art. X, § 4 allowed the public to cross private property to get to navigable water, but if that provision meant what Justice BRENNAN believes, it is hard to see why it was not invoked.) See also 41 Op.Cal.Atty.Gen. 39, 41 (1963) ("In spite of the sweeping provisions of [Art. X, § 4], and the injunction therein to the Legislature to give its provisions the most liberal interpretation, the few reported cases in California have adopted the general rule that one may not trespass on private land to get to navigable tidewaters for the purpose of commerce, navigation or fishing"). In light of these uncertainties, and given the fact that, as Justice BLACKMUN notes, the Court of Appeal did not rest its decision on Art. X, § 4, *post*, at 3163, we should assuredly not take it upon ourselves to resolve this question of California constitutional law in the first instance. See, *e.g.*, *Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1, 100 S.Ct. 2124, 2127, n. 1, 65 L.Ed.2d 86 (1980). That would be doubly inappropriate since the Commission did not advance this argument in the Court of Appeal, and the Nollans argued in the Superior Court that any claim that there was a pre-existing public right of access had to be asserted through a quiet title action, see Points and Authorities in Support of Motion for Writ of Administrative Mandamus, No. SP50805 (Super.Ct.Cal.), p. 20, which the Commission, possessing no claim to the easement itself, probably would not have had standing under California law to bring. See

1. The holding of *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition permanent access was not required. The analysis of *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), is not inconsistent because it was affected by traditional doctrines regarding navigational servitudes. Of course neither of those cases involved, as this one does, a classic right-of-way easement.

Cal.Code Civ.Proc.Ann. § 738 (West 1980).[2]

|834Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome. We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.[3] They have made clear, however, that a |835broad range of governmental purposes and regulations satisfies these requirements. See *Agins v. Tiburon, supra*, 447 U.S., at 260–262, 100 S.Ct., at 2141–2142 (scenic zoning); *Penn Central Transportation Co. v. New York City, supra* (landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71

2. Justice BRENNAN also suggests that the Commission's public announcement of its intention to condition the rebuilding of houses on the transfer of easements of access caused the Nollans to have "no reasonable claim to any expectation of being able to exclude members of the public" from walking across their beach. *Post*, at 3159–3161. He cites our opinion in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), as support for the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights. In *Monsanto*, however, we found merely that the Takings Clause was not violated by giving effect to the Government's announcement that application for "*the right to [the] valuable Government benefit*," *id.*, at 1007, 104 S.Ct., at 2875 (emphasis added), of obtaining registration of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. *Id.*, at 1007–1008, 104 S.Ct., at 2875–2876. See also *Bowen v. Gilliard*, 483 U.S. 587, 605, 107 S.Ct. 3008, 3019, 97 L.Ed.2d 485 (1987). But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange," 467 U.S., at 1007, 104 S.Ct., at 2875, that we found to have occurred in *Monsanto*. Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

3. Contrary to Justice BRENNAN's claim, *post*, at 3150, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." *Post*, at 3152, quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981). Justice BRENNAN relies principally on an equal protection case, *Minnesota v. Clover Leaf Creamery Co., supra*, and two substantive due process cases, *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487–488, 75 S.Ct. 461, 464–465, 99 L.Ed. 563 (1955), and *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952), in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.

L.Ed. 303 (1926) (residential zoning); Laitos & Westfall, Government Interference with Private Interests in Public Resources, 11 Harv.Envtl.L.Rev. 1, 66 (1987). The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so—in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction)[4] would substantially impede these purposes,[836] unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking. See *Penn Central Transportation Co. v. New York City, supra.*

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the [837]owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in

4. If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); see also *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 656, 101 S.Ct. 1287, 1306, 67 L.Ed.2d 551 (1981) (BRENNAN, J., dissenting); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). But that is not the basis of the Nollans' challenge here.

order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14–15 (1981); see Brief for United States as *Amicus Curiae* 22, and n. 20. See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S., at 439, n. 17, 102 S.Ct., at 3178, n. 17.[5]

|838III

The Commission claims that it concedes as much, and that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards. The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

[2] Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them |839caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.[6] Our conclusion on this

5. One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

6. As Justice BRENNAN notes, the Commission also argued that the construction of the new house would " 'increase private use immediately adjacent to public tidelands,' " which in turn might result in more disputes between the Nollans and the public as to the location of the boundary. *Post*, at 3156, quoting App. 62. That risk of boundary disputes, however, is inherent in the right to exclude others from one's property, and the construction here can no more justify mandatory dedication of a sort of "buffer zone" in order to avoid boundary disputes than can the construction of an addition to a single-family house near a public street. Moreover, a buffer zone has a boundary as well, and unless that zone is a "no-man's land" that is off limits for both neighbors (which is of course not the

point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts. See *Parks v. Watson*, 716 F.2d 646, 651–653 (CA9 1983); *Bethlehem Evangelical Lutheran Church v. Lakewood*, 626 P.2d 668, 671–674 (Colo. 1981); *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 117–120, 273 A.2d 880, 885 (1970); *Longboat Key v. Lands End, Ltd.*, 433 So.2d 574 (Fla.App.1983); *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill.2d 375, 380, 176 N.E.2d 799, 802 (1961); *Lampton v. Pinaire*, 610 S.W.2d 915, 918–919 (Ky.App. 1980); *Schwing v. Baton Rouge*, 249 So.2d 304 (La.App.), application denied, 259 La. 770, 252 So.2d 667 (1971); *Howard County v. JJM, Inc.*, 301 Md. 256, 280–282, 482 A.2d 908, 920–921 (1984); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363 (Mo.1972); |840 *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 33–36, 394 P.2d 182, 187–188 (1964); *Simpson v. North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980); *Briar West, Inc. v. Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980); *J.E.D. Associates v. Atkinson*, 121 N.H. 581, 432 A.2d 12 (1981); *Longridge Builders, Inc. v. Planning Bd. of Princeton*, 52 N.J. 348, 350–351, 245 A.2d 336, 337–338 (1968); *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966); *MacKall v. White*, 85 App.Div.2d 696, 445 N.Y.S.2d 486 (1981), appeal denied, 56 N.Y.2d 503, 450 N.Y.S.2d 1025, 435 N.E.2d 1100 (1982); *Frank Ansuini, Inc. v. Cranston*, 107 R.I. 63, 68–69, 71, 264 A.2d 910, 913, 914 (1970); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex.1984); *Call v. West Jordan*, 614 P.2d 1257, 1258–1259 (Utah 1980); *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 136–139, 216 S.E.2d 199, 207–209 (1975); *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 617–618, 137 N.W.2d 442, 447–449 (1965), appeal dism'd, 385 U.S. 4, 87 S.Ct. 36, 17 L.Ed.2d 3 (1966). See also *Littlefield v. Afton*, 785 F.2d 596, 607 (CA8 1986); Brief for National Association of Home Builders et al. as *Amici Curiae* 9–16.

Justice BRENNAN argues that imposition of the access requirement is not irrational. In his version of the Commission's argument, the reason for the requirement is that in its absence, a person looking toward the beach from the road will see a street of residential structures including the Nollans' new home and conclude that there is no public beach nearby. If, however, that person sees people passing and repassing along the dry sand behind the Nollans' home, he will realize that there is a public beach somewhere in the vicinity. *Post*, at 3155–3156. The Commission's action, however, was based on the opposite factual finding that the wall of houses completely blocked the view of the beach and that a person looking from the road would not be able to see it at all. App. 57–59.

Even if the Commission had made the finding that Justice BRENNAN proposes however, it is not certain that it would |841 suffice. We do not share Justice BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," *post*, at 3161, that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a

case here) its creation achieves nothing except to shift the location of the boundary dispute further on to the private owner's land. It is true that in the distinctive situation of the Nollans' property the seawall could be established as a clear demarcation of the public easement. But since not all of the lands to which this land-use condition applies have such a convenient reference point, the avoidance of boundary disputes is, even more obviously than the others, a made up purpose of the regulation.

legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

We are left, then, with the Commission's justification for the access requirement unrelated to land-use regulation:

> "Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment." App. 68.

That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose,[842]" see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.

Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Appellants in this case sought to construct a new dwelling on their beach lot that would both diminish visual access to the beach and move private development closer to the public tidelands. The Commission reasonably concluded that such "buildout," both individually and cumulatively, threatens public access to the shore. It sought to offset this encroachment by obtaining assurance that the public may walk along the shoreline in order to gain access to the ocean. The Court finds this an illegitimate exercise of the police power, because it maintains that there is no reasonable relationship between the effect of the development and the condition imposed.

The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century. Furthermore, even under the Court's cramped standard, the permit condition imposed in this case directly responds to the specific type of burden on access created by appellants' development. Finally, a review of those factors deemed most significant in takings analysis makes clear that the Commission's action implicates none of the concerns underlying the Takings Clause. The Court has thus struck down the Commission's reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in short, given appellants a windfall at the expense of the public.

I

The Court's conclusion that the permit condition imposed on appellants is unreasonable cannot withstand analysis. First, the Court demands a degree of exactitude that is inconsistent[843] with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens. Second, even if the nature of the public-access condition imposed must be identical to the precise burden on access created by appellants, this requirement is plainly satisfied.

A

There can be no dispute that the police power of the States encompasses the authority to impose conditions on private de-

velopment. See, *e.g., Agins v. Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Gorieb v. Fox,* 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927). It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State "*could rationally have decided*" that the measure adopted might achieve the State's objective. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981) (emphasis in original).[1] In this case, California has [844]employed its police power in order to condition development upon preservation of public access to the ocean and tidelands. The Coastal Commission, if it had so chosen, could have denied[845] the Nollans' request for a devel-

1. See also *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 487–488, 75 S.Ct. 461, 464–465, 99 L.Ed. 563 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952) ("Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.... [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare").

Notwithstanding the suggestion otherwise, *ante,* at 3147, n. 3, our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one. As we stated over 25 years ago in addressing a takings challenge to government regulation:

"The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton v. Steele,* 152 U.S. 133, 137 [14 S.Ct. 499, 501, 38 L.Ed. 385] (1894), is still valid today: ... '[I]t must appear, first, that the interests of the public ... require [government] interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature ....' *E.g., Sproles v. Binford,* 286 U.S. 374, 388 [52 S.Ct. 581, 585, 76 L.Ed. 1167] (1932)." *Goldblatt v. Hempstead,* 369 U.S. 590, 594–595, 82 S.Ct. 987, 990–991, 8 L.Ed.2d 130 (1962).

See also *id.,* at 596, 82 S.Ct. at 991 (upholding regulation from takings challenge with citation to, *inter alia, United States v. Carolene Products Co.,* 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938), for proposition that exercise of police power will be upheld "if any state of facts either known or which could be reasonably assumed affords support for it"). In *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), for instance, we reviewed a takings challenge to statutory provisions that had been held to be a legitimate exercise of the police power under due process analysis in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.,* 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984). *Gray,* in turn, had relied on *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). In rejecting the takings argument that the provisions were not within Congress' regulatory power, the Court in *Connolly* stated: "Although both *Gray* and *Turner Elkhorn* were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved." 475 U.S., at 223, 106 S.Ct., at 1025. Our phraseology may differ slightly from case to case—*e.g.,* regulation must "substantially advance," *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), or be "reasonably necessary to," *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978), the government's end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.

Of course, government action may be a valid exercise of the police power and still violate specific provisions of the Constitution. Justice SCALIA is certainly correct in observing that challenges founded upon these provisions are reviewed under different standards. *Ante,* at 3147, n. 3. Our consideration of factors such as those identified in *Penn Central, supra,* for instance, provides an analytical framework for protecting the values underlying the Takings Clause, and other distinctive approaches are utilized to give effect to other constitutional provisions. This is far different, however, from the use of different standards of review to address the threshold issue of the rationality of government action.

opment permit, since the property would have remained economically viable without the requested new development.[2] Instead, the State sought to accommodate the Nollans' desire for new development, on the condition that the development not diminish the overall amount of public access to the coastline. Appellants' proposed development would reduce public access by restricting visual access to the beach, by contributing to an increased need for community facilities, and by moving private development closer to public beach property. The Commission sought to offset this diminution in access, and thereby preserve the overall balance of access, by requesting a deed restriction that would ensure "lateral" access: the right of the public to pass and repass along the dry sand parallel to the shoreline in order to reach the tidelands and the ocean. In the expert opinion of the Coastal Commission, development conditioned on such a restriction would fairly attend to both public and private interests.

The Court finds fault with this measure because it regards the condition as insufficiently tailored to address the precise 846type of reduction in access produced by the new development. The Nollans' development blocks visual access, the Court tells us, while the Commission seeks to preserve lateral access along the coastline. Thus, it concludes, the State acted irrationally. Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government." *Sproles v. Binford*, 286 U.S. 374, 388, 52 S.Ct. 581, 585, 76 L.Ed. 1167 (1932). Cf. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491, n. 21, 107 S.Ct. 1232, 1245, n. 21, 94 L.Ed.2d 472 (1987) ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens ... in excess of the benefits received"). As this Court long ago declared with regard to various forms of restriction on the use of property:

> "Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb*, 274 U.S., at 608, 47 S.Ct., at 677 (citations omitted).

2. As this Court declared in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127, 106 S.Ct. 455, 459, 88 L.Ed.2d 419 (1985):
"A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."
We also stated in *Kaiser Aetna v. United States*, 444 U.S. 164, 179, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979), with respect to dredging to create a private marina:
"We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation."

The Commission is charged by both the State Constitution and legislature to preserve overall public access to the California coastline. Furthermore, by virtue of its participation in the Coastal Zone Management Act (CZMA) program, the [847]State must "exercise effectively [its] responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone," 16 U.S.C. § 1452(2), so as to provide for, *inter alia*, "public access to the coas[t] for recreation purposes." § 1452(2)(D). The Commission has sought to discharge its responsibilities in a flexible manner. It has sought to balance private and public interests and to accept tradeoffs: to permit development that reduces access in some ways as long as other means of access are enhanced. In this case, it has determined that the Nollans' burden on access would be offset by a deed restriction that formalizes the public's right to pass along the shore. In its informed judgment, such a tradeoff would preserve the net amount of public access to the coastline. The Court's insistence on a precise fit between the forms of burden and condition on each individual parcel along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate.

The Court's demand for this precise fit is based on the assumption that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt. In fact, the situation is precisely the reverse: it is private landowners who are the interlopers. The public's expectation of access considerably antedates any private development on the coast. Article X, § 4, of the California Constitution, adopted in 1879, declares:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so [848]that access to the navigable waters of this State shall always be attainable for the people thereof."

It is therefore private landowners who threaten the disruption of settled public expectations. Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose. In this case, however, the State has sought to protect *public* expectations of access from disruption by private land use. The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens.

Congress expressly stated in passing the CZMA that "[i]n light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate." 16 U.S.C. § 1451(h). It is thus puzzling that the Court characterizes as a "non-land-use justification," *ante*, at 3151, the exercise of the police power to " 'provide continuous public access along Faria Beach as the lots undergo development or redevelopment.' " *Ibid.* (quoting App. 68). The Commission's determination that certain types of development jeopardize public access to the ocean, and that such development should be conditioned on preservation of access, is the essence of responsible land-use planning. The Court's use of an unreasonably demanding standard for determining the rationality of state regulation in this area thus could hamper innovative efforts to

preserve an increasingly fragile national resource.[3]

[1849]B

Even if we accept the Court's unusual demand for a precise match between the condition imposed and the specific type of burden on access created by the appellants, the State's action easily satisfies this requirement. First, the lateral access condition serves to dissipate the impression that the beach that lies behind the wall of homes along the shore is for private use only. It requires no exceptional imaginative powers to find plausible the Commission's point that the average person passing along the road in front of a phalanx of imposing permanent residences, including the appellants' new home, is likely to conclude that this particular portion of the shore is not open to the public. If, however, that person can see that numerous people are passing and repassing along the dry sand, this conveys the message that the beach is in fact open for use by the public. Furthermore, those persons who go down to the public beach a quarter-mile away will be able to look down the coastline and see that persons have continuous access to the tidelands, and will observe signs that proclaim the public's right of access over the dry sand. The burden produced by the diminution in visual access—the impression that the beach is not open to the public—is thus directly alleviated by the provision for public access over the dry sand. The Court therefore has an [1850]unrealistically limited conception of what measures could reasonably be chosen to mitigate the burden produced by a diminution of visual access.

The second flaw in the Court's analysis of the fit between burden and exaction is more fundamental. The Court assumes that the only burden with which the Coastal Commission was concerned was blockage of visual access to the beach. This is incorrect.[4] The Commission specifically stated in its report in support of the permit condition that "[t]he Commission finds that the applicants' proposed development would present an increase in view blockage, *an increase in private use of the shorefront*, and that this impact would burden the public's ability to traverse to and along the shorefront." App. 65–66 (emphasis added). It declared that the possibility that "the public may get the impression that the beachfront is no longer available for public use" would be "due to *the encroaching nature of private use immediately adjacent to the public use, as well as* the visual 'block' of increased residential build-out impacting the visual quality of the beachfront." *Id.*, at 59 (emphasis added).

The record prepared by the Commission is replete with references to the threat to

3. The list of cases cited by the Court as support for its approach, *ante*, at 3149–3150, includes no instance in which the State sought to vindicate pre-existing rights of access to navigable water, and consists principally of cases involving a requirement of the dedication of land as a condition of subdivision approval. Dedication, of course, requires the surrender of ownership of property rather than, as in this case, a mere restriction on its use. The only case pertaining to beach access among those cited by the Court is *MacKall v. White*, 85 App.Div.2d 696, 445 N.Y.S.2d 486 (1981). In that case, the court found that a subdivision application could not be conditioned upon a declaration that the landowner would not hinder the public from using a trail that had been used to gain access to a bay. The trail had been used despite posted warnings prohibiting passage, and despite the owner's resistance to such use. In that case, unlike this one, neither the State Constitution, state statute, administrative practice, nor the conduct of the landowner operated to create any reasonable expectation of a right of public access.

4. This may be because the State in its briefs and at argument contended merely that the permit condition would serve to preserve overall public access, by offsetting the diminution in access resulting from the project, such as, *inter alia*, blocking the public's view of the beach. The State's position no doubt reflected the reasonable assumption that the Court would evaluate the rationality of its exercise of the police power in accordance with the traditional standard of review, and that the Court would not attempt to substitute its judgment about the best way to preserve overall public access to the ocean at the Faria Family Beach Tract.

public access along the coastline resulting from the seaward encroachment of private development along a beach whose mean high-tide line is constantly shifting. As the Commission observed in its report: "The Faria Beach shoreline fluctuates during the year depending on the seasons and accompanying storms, and the public is not always able to traverse the shoreline below the mean 851 high tide line." *Id.*, at 67. As a result, the boundary between publicly owned tidelands and privately owned beach is not a stable one, and "[t]he existing seawall is located very near to the mean high water line." *Id.*, at 61. When the beach is at its largest, the seawall is about 10 feet from the mean high-tide mark; "[d]uring the period of the year when the beach suffers erosion, the mean high water line appears to be located either on or beyond the existing seawall." *Ibid.* Expansion of private development on appellants' lot toward the seawall would thus "increase private use immediately adjacent to public tidelands, which has the potential of causing adverse impacts on the public's ability to traverse the shoreline." *Id.*, at 62. As the Commission explained:

> "The placement of more private use adjacent to public tidelands has the potential of creating use conflicts between the applicants and the public. The results of new private use encroachment into boundary/buffer areas between private and public property can create situations in which landowners intimidate the public and seek to prevent them from using public tidelands because of disputes between the two parties over where the exact boundary between private and public ownership is located. If the applicants' project would result in further seaward encroachment of private use into an area of clouded title, new private use in the subject encroachment area could result in use conflict between private and public entities on the subject shorefront." *Id.*, at 61–62.

The deed restriction on which permit approval was conditioned would directly address this threat to the public's access to the tidelands. It would provide a formal declaration of the public's right of access, thereby ensuring that the shifting character of the tidelands, and the presence of private development immediately adjacent to it, would not jeopardize 852 enjoyment of that right.[5] The imposition of the permit condition was therefore directly related to the fact that appellants development would be "located along a unique stretch of coast where lateral public access is inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline." *Id.*, at 68. The deed restriction was crafted to deal with the particular character of the beach along which appellants sought to build, and with the specific problems created by expansion of development toward the public tidelands. In imposing the restriction, the State sought to ensure that such development would not disrupt the historical expectation of the public regarding access to the sea.[6]

5. As the Commission's Public Access (Shoreline) Interpretative Guidelines state:

> "[T]he provision of lateral access recognizes the potential for conflicts between public and private use and creates a type of access that allows the public to move freely along all the tidelands in an area that can be clearly delineated and distinguished from private use areas.... Thus the 'need' determination set forth in P[ublic] R[esources] C[ode] 30212(a)(2) should be measured in terms of providing access that buffers public access to the tidelands from the burdens generated on access by private development." App. 358–359.

6. The Court suggests that the risk of boundary disputes "is inherent in the right to exclude others from one's property," and thus cannot serve as a purpose to support the permit condition. *Ante*, at 3149, n. 6. The Commission sought the deed restriction, however, not to address a generalized problem inherent in any system of property, but to address the *particular* problem created by the shifting high-tide line along Faria Beach. Unlike the typical area in which a boundary is delineated reasonably clearly, the very problem on Faria Beach is that the boundary is *not* constant. The area open to public use therefore is frequently in question, and, as the discussion, *supra*, demonstrates, the

[853]The Court is therefore simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development. Even were the Court desirous of assuming the added responsibility of closely monitoring the regulation of development along the California coast, this record reveals rational public action by any conceivable standard.

II

The fact that the Commission's action is a legitimate exercise of the police power does not, of course, insulate it from a takings challenge, for when "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). Conventional takings analysis underscores the implausibility of the Court's holding, for it demonstrates that this exercise of California's police power implicates none of the concerns that underlie our takings jurisprudence.

In reviewing a Takings Clause claim, we have regarded as particularly significant the nature of the governmental action and the economic impact of regulation, especially the extent to which regulation interferes with investment-backed expectations. *Penn Central,* 438 U.S., at 124, 98 S.Ct., at 2659. The character of the government action in this case is the imposition of a condition on permit approval, which allows the public to continue to have access to the coast. The physical intrusion permitted by the deed restriction is minimal. The public is permitted the right to pass and repass along the coast in an area from the seawall to the mean high-tide mark. App. 46. This area is at its *widest* 10 feet, *id.,* at 61, which means that *even without the permit condition,* the public's right of access permits it to pass on average within a few feet of the seawall. Passage closer to the 8-foot-high rocky seawall will make the [854]appellants even less visible to the public than passage along the high-tide area farther out on the beach. The intrusiveness of such passage is even less than the intrusion resulting from the required dedication of a sidewalk in front of private residences, exactions which are commonplace conditions on approval of development.[7] Furthermore, the high-tide line shifts throughout the year, moving up to and beyond the seawall, so that public passage for a portion of the year would either be impossible or would not occur on appellant's property. Finally, although the Commission had the authority to provide for either passive or active recreational use of the property, it chose the least intrusive alternative: a mere right to pass and repass. *Id.,* at 370.[8]

Commission clearly tailored its permit condition precisely to address this specific problem.

The Court acknowledges that the Nollans' seawall could provide "a clear demarcation of the public easement," and thus avoid merely shifting "the location of the boundary dispute further on to the private owner's land." *Ante,* at 3150, n. 6. It nonetheless faults the Commission because every property subject to regulation may not have this feature. This case, however, is a challenge to the permit condition *as applied to the Nollans' property,* so the presence or absence of seawalls on other property is irrelevant.

7. See, *e.g., Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co.,* 460 S.W.2d 298 (Mo.Ct.App. 1970); *Allen v. Stockwell,* 210 Mich. 488, 178 N.W. 27 (1920). See generally Shultz & Kelley, Subdivision Improvement Requirements and Guarantees: A Primer, 28 Wash.U.J.Urban and Contemp.L. 3 (1985).

8. The Commission acted in accordance with its Guidelines both in determining the width of the area of passage, and in prohibiting any recreational use of the property. The Guidelines state that it may be necessary on occasion to provide for less than the normal 25-foot-wide accessway along the dry sand when this may be necessary to "protect the privacy rights of adjacent property owners." App. 363. They also provide this advice in selecting the type of public use that may be permitted:

"*Pass and Repass.* Where topographic constraints of the site make use of the beach dangerous, where habitat values of the shoreline would be adversely impacted by public use of the shoreline or where the accessway may encroach closer than 20 feet to a residential structure, the accessway may be limited to the right of the public to pass and repass along the access area. For the purposes of these guidelines, pass and repass is defined as the right to walk and

As this Court made |855clear in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2042, 64 L.Ed.2d 741 (1980), physical access to private property in itself creates no takings problem if it does not "unreasonably impair the value or use of [the] property." Appellants can make no tenable claim that either their enjoyment of their property or its value is diminished by the public's ability merely to pass and repass a few feet closer to the seawall beyond which appellants' house is located.

PruneYard is also relevant in that we acknowledged in that case that public access rested upon a "state constitutional ... provision that had been construed to create rights to the use of private property by strangers." *Id.*, at 81, 100 S.Ct., at 2041. In this case, of course, the State is also acting to protect a state constitutional right. See *supra*, at 3154 (quoting Art. X, § 4, of California Constitution). The constitutional provision guaranteeing public access to the ocean states that "the Legislature shall enact such laws as will give *the most liberal construction to this provision* so that access to the navigable waters of this State shall be always attainable for the people thereof." Cal. Const., Art. X, § 4 (emphasis added). This provision is the explicit basis for the statutory directive to provide for public access along the coast in new development projects, Cal.Pub.Res. Code Ann. § 30212 (West 1986), and has been construed by the state judiciary to permit passage over private land where necessary to gain access to the tidelands. *Grupe v. California Coastal Comm'n*, 166 Cal.App.3d 148, 171–172, 212 Cal.Rptr. 578, 592–593 (1985). The physical access to the perimeter of appellants' property at issue in this case thus results directly from the State's enforcement of the State Constitution.

Finally, the character of the regulation in this case is not unilateral government action, but a condition on approval of a development request submitted by appellants. The State has not sought to interfere with any pre-existing property interest, but has responded to appellants' proposal to intensify development on the coast. Appellants themselves chose to |856submit a new development application, and could claim no property interest in its approval. They were aware that approval of such development would be conditioned on preservation of adequate public access to the ocean. The State has initiated no action against appellants' property; had the Nollans' not proposed more intensive development in the coastal zone, they would never have been subject to the provision that they challenge.

Examination of the economic impact of the Commission's action reinforces the conclusion that no taking has occurred. Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a "reciprocity of advantage." *Pennsylvania Coal*, 260 U.S., at 415, 43 S.Ct., at 160. Appellants have been allowed to replace a one-story, 521-square-foot beach home with a two-story, 1,674-square-foot residence and an attached two-car garage, resulting in development covering 2,464 square feet of the lot. Such development obviously significantly increases the value of appellants' property; appellants make no contention that this increase is offset by any diminution in value resulting from the deed restriction, much less that the restriction made the property less valuable than it would have been without the new construction. Furthermore, appellants gain an additional benefit from the Commission's per-

run along the shoreline. This would provide for public access along the shoreline but would not allow for any additional use of the accessway. Because this severely limits the public's ability to enjoy the adjacent state owned tidelands by restricting the potential use of the access areas, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner." *Id.*, at 370.

mit condition program. They are able to walk along the beach beyond the confines of their own property only because the Commission has required deed restrictions as a condition of approving other new beach developments.[9] Thus, appellants benefit both as private landowners and as members of the public from the fact that new development permit requests are conditioned on preservation of public access.

|857 Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development. Appellants submitted a proposal for more intensive development of the coast, which the Commission was under no obligation to approve, and now argue that a regulation designed to ameliorate the impact of that development deprives them of the full value of their improvements. Even if this novel claim were somehow cognizable, it is not significant. "[T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus v. Allard,* 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979).

With respect to appellants' investment-backed expectations, appellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean. It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights. "[A]s a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes v. Washington,* 389 U.S. 290, 295, 88 S.Ct. 438, 441, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring). See also *Borax Consolidated, Ltd. v. Los Angeles,* 296 U.S. 10, 22, 56 S.Ct. 23, 29, 80 L.Ed. 9 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law"). In this case, the State Constitution explicitly states that no one possessing the "frontage" of any "navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose." Cal. Const., Art. X, § 4. The state Code expressly provides that, save for exceptions not relevant here, "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects." Cal.Pub.Res.Code Ann. § 30212 (West 1986). The Coastal Commission Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty |858 requires that approval of new coastline development be conditioned upon provisions ensuring lateral public access to the ocean. App. 362. At the time of appellants' permit request, the Commission had conditioned all 43 of the proposals for coastal new development in the Faria Family Beach Tract on the provision of deed restrictions ensuring lateral access along the shore. *Id.,* at 48. Finally, the Faria family had leased the beach property since the early part of this century, and "the Faria family and their lessees [including the Nollans] had not interfered with public use of the beachfront within the Tract, so long as public use was limited to pass and re-pass lateral access along the shore." *Ibid.* California therefore has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights, and appellants have never acted as if it were. Given this state of affairs, appellants cannot claim that the deed restriction has deprived them of a reasonable expectation to exclude from their property persons desiring to gain access to the sea.

Even were we somehow to concede a pre-existing expectation of a right to exclude, appellants were clearly on notice

9. At the time of the Nollans' permit application, 43 of the permit requests for development along the Faria Beach had been conditioned on deed restrictions ensuring lateral public access along the shoreline. App. 48.

when requesting a new development permit that a condition of approval would be a provision ensuring public lateral access to the shore. Thus, they surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward. In this respect, this case is quite similar to *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). In *Monsanto*, the respondent had submitted trade data to the Environmental Protection Agency (EPA) for the purpose of obtaining registration of certain pesticides. The company claimed that the agency's disclosure of certain data in accordance with the relevant regulatory statute constituted a taking. The Court conceded that the data in question constituted property under state law. It also found, however, that certain of the data had been submitted to the agency after Congress had [859]made clear that only limited confidentiality would be given data submitted for registration purposes. The Court observed that the statute served to inform Monsanto of the various conditions under which data might be released, and stated:

> "If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission." *Id.*, at 1006–1007, 104 S.Ct., at 2874–2875.

The Court rejected respondent's argument that the requirement that it relinquish some confidentiality imposed an unconstitutional condition on receipt of a Government benefit:

> "[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Id.*, at 1007, 104 S.Ct., at 2875.

The similarity of this case to *Monsanto* is obvious. Appellants were aware that stringent regulation of development along the California coast had been in place at least since 1976. The specific deed restriction to which the Commission sought to subject them had been imposed since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract. App. 48. Such regulation to ensure public access to the ocean had been directly authorized by California citizens in 1972, and reflected their judgment that restrictions on coastal development represented " 'the advantage of living and doing business in a civilized community.' " *Andrus v. Allard*, *supra*, 444 U.S., at 67, 100 S.Ct., at 328, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 422, 43 S.Ct., at 163 (Brandeis, J., dissenting). The deed restriction was "authorized by law at the [860]time of [appellants' permit] submission," *Monsanto*, *supra*, 467 U.S., at 1007, 104 S.Ct., at 2875, and, as earlier analysis demonstrates, *supra*, at 3155–3157, was reasonably related to the objective of ensuring public access. Appellants thus were on notice that new developments would be approved only if provisions were made for lateral beach access. In requesting a new development permit from the Commission, they could have no reasonable expectation of, and had no entitlement to, approval of their permit application without any deed restriction ensuring public access to the ocean. As a result, analysis of appellants' investment-backed expectations reveals that "the force of this factor is so overwhelming ... that it disposes of the taking question." *Monsanto*, *supra*, at 1005, 104 S.Ct., at 2874.[10]

10. The Court suggests that *Ruckelshaus v. Monsanto* is distinguishable, because government regulation of property in that case was a condition on receipt of a "government benefit," while here regulation takes the form of a restriction on "the right to build on one's own property," which "cannot remotely be described as a 'government benefit.'" *ante*, at 3147, n. 2. This

Standard Takings Clause analysis thus indicates that the Court employs its unduly restrictive standard of police power rationality to find a taking where neither the character of governmental action nor the nature of the private interest affected raise any takings concern. The result is that the Court invalidates regulation that represents a reasonable adjustment[861] of the burdens and benefits of development along the California coast.

III

The foregoing analysis makes clear that the State has taken no property from appellants. Imposition of the permit condition in this case represents the State's reasonable exercise of its police power. The Coastal Commission has drawn on its expertise to preserve the balance between private development and public access, by requiring that any project that intensifies development on the increasingly crowded California coast must be offset by gains in public access. Under the normal standard for review of the police power, this provision is eminently reasonable. Even accepting the Court's novel insistence on a precise *quid pro quo* of burdens and benefits, there is a reasonable relationship between the public benefit and the burden created by appellants' development. The movement of development closer to the ocean creates the prospect of encroachment on public tidelands, because of fluctuation in the mean high-tide line. The deed restriction ensures that disputes about the boundary between private and public property will not deter the public from exercising its right to have access to the sea.

Furthermore, consideration of the Commission's action under traditional takings analysis underscores the absence of any viable takings claim. The deed restriction permits the public only to pass and repass along a narrow strip of beach, a few feet closer to a seawall at the periphery of appellants' property. Appellants almost surely have enjoyed an increase in the value of their property even with the restriction, because they have been allowed to build a significantly larger new home with garage on their lot. Finally, appellants can claim the disruption of no expectation interest, both because they have no right to exclude the public under state law, and because, even if they did, they had full advance notice that new development along the coast is conditioned on provisions for continued public access to the ocean.

[862]Fortunately, the Court's decision regarding this application of the Commission's permit program will probably have little ultimate impact either on this parcel in particular or the Commission program in general. A preliminary study by a Senior Lands Agent in the State Attorney General's Office indicates that the portion of the beach at issue in this case likely belongs to the public. App. 85.[11] Since a full study had not been completed at the time of appellants' permit application, the deed restriction was requested "without regard to the possibility that the applicant is proposing development on public land." *Id.*, at 45. Furthermore, analysis by the same Land Agent also indicated that the public

proffered distinction is not persuasive. Both Monsanto and the Nollans hold property whose use is subject to regulation; Monsanto may not sell its property without obtaining government approval and the Nollans may not build new development on their property without government approval. Obtaining such approval is as much a "government benefit" for the Nollans as it is for Monsanto. If the Court is somehow suggesting that "the right to build on one's own property" has some privileged natural rights status, the argument is a curious one. By any traditional labor theory of value justification for property rights, for instance, see, *e.g.*, J. Locke, The Second Treatise of Civil Government 15–26 (E. Gough, ed. 1947), Monsanto would have a superior claim, for the chemical formulae which constitute its property only came into being by virtue of Monsanto's efforts.

11. The Senior Land Agent's report to the Commission states that "based on my observations, presently, most, if not all of Faria Beach waterward of the existing seawalls [lies] *below* the Mean High Tide Level, and would fall in public domain or sovereign category of ownership." App. 85 (emphasis added).

had obtained a prescriptive right to the use of Faria Beach from the seawall to the ocean. *Id.*, at 86.[12] The Superior Court explicitly stated in its ruling against the Commission on the permit condition issue that "no part of this opinion is intended to foreclose the public's opportunity to adjudicate the possibility that public rights in [appellants'] beach have been acquired through prescriptive use." *Id.*, at 420.

With respect to the permit condition program in general, the Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access produced by new development. Neither the Commission in its report nor the State in its briefs and at argument highlighted the particular threat to lateral access created by appellants' |863development project. In defending its action, the State emphasized the general point that *overall* access to the beach had been preserved, since the diminution of access created by the project had been offset by the gain in lateral access. This approach is understandable, given that the State relied on the reasonable assumption that its action was justified under the normal standard of review for determining legitimate exercises of a State's police power. In the future, alerted to the Court's apparently more demanding requirement, it need only make clear that a provision for public access directly responds to a particular type of burden on access created by a new development. Even if I did not believe that the record in this case satisfies this requirement, I would have to acknowledge that the record's documentation of the impact of coastal development indicates that the Commission should have little problem presenting its findings in a way that avoids a takings problem.

Nonetheless it is important to point out that the Court's insistence on a precise accounting system in this case is insensitive to the fact that increasing intensity of development in many areas calls for farsighted, comprehensive planning that takes into account both the interdependence of land uses and the cumulative impact of development.[13] As one scholar has noted:

> "Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is |864more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user." Sax, Takings, Private Property, and Public Rights, 81 Yale L.J. 149, 152 (1971) (footnote omitted).

As Congress has declared: "The key to more effective protection and use of the land and water resources of the coastal zone [is for the states to] develo[p] land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance." 16 U.S.C.

12. The Senior Land Agent's report stated:
"Based on my past experience and my investigation to date of this property it is my opinion that the area seaward of the revetment at 3822 Pacific Coast Highway, Faria Beach, as well as all the area seaward of the revetments built to protect the Faria Beach community, if not public owned, has been impliedly dedicated to the public for passive recreational use." *Id.*, at 86.

13. As the California Court of Appeals noted in 1985, "Since 1972, permission has been granted to construct more than 42,000 building units within the land jurisdiction of the Coastal Commission. In addition, pressure for development along the coast is expected to increase since approximately 85% of California's population lives within 30 miles of the coast." *Grupe v. California Coastal Comm'n*, 166 Cal.App.3d 148, 167, n. 12, 212 Cal.Rptr. 578, 589, n. 12 (1985). See also Coastal Zone Management Act, 16 U.S.C. § 1451(c) (increasing demands on coastal zones "have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion").

§ 1451(i). This is clearly a call for a focus on the overall impact of development on coastal areas. State agencies therefore require considerable flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast. They should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck. Its reasoning is hardly suited to the complex reality of natural resource protection in the 20th century. I can only hope that today's decision is an aberration, and that a broader vision ultimately prevails.[14]

I dissent.

[865] Justice BLACKMUN, dissenting.

I do not understand the Court's opinion in this case to implicate in any way the public-trust doctrine. The Court certainly had no reason to address the issue, for the Court of Appeal of California did not rest its decision on Art. X, § 4, of the California Constitution. Nor did the parties base their arguments before this Court on the doctrine.

I disagree with the Court's rigid interpretation of the necessary correlation between a burden created by development and a condition imposed pursuant to the State's police power to mitigate that burden. The land-use problems this country faces require creative solutions. These are not advanced by an "eye for an eye" mentality. The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based. See, *e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981). In my view, the easement exacted from appellants and the problems their development created are adequately related to the governmental interest in providing public access to the beach. Coastal development by its very nature makes public access to the shore generally more difficult. Appellants' structure is part of that general development and, in particular, it diminishes the public's visual access to the ocean and decreases the public's sense that it may have physical access to the beach. These losses in access can be counteracted, at least in part, by the condition on appellants' construction permitting public passage that ensures access along the beach.

Traditional takings analysis compels the conclusion that there is no taking here. The governmental action is a valid exercise of the police power, and, so far as the record reveals, [866] has a nonexistent economic effect on the value of appellants' property. No investment-backed expectations were diminished. It is significant that the Nollans had notice of the easement before they purchased the property and that public use of the beach had been permitted for decades.

For these reasons, I respectfully dissent.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

The debate between the Court and Justice BRENNAN illustrates an extremely important point concerning governmental regulation of the use of privately owned

14. I believe that States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts will often be found to constitute a taking. "*If* ... regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,'" however, I believe that compensation is the appropriate remedy for this constitutional violation. *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 656, 101 S.Ct. 1287, 1306, 67 L.Ed.2d 551 (1981) (BRENNAN, J., dissenting) (emphasis added). I therefore see my dissent here as completely consistent with my position in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

real estate. Intelligent, well-informed public officials may in good faith disagree about the validity of specific types of land-use regulation. Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence. Yet, because of the Court's remarkable ruling in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), local governments and officials must pay the price for the necessarily vague standards in this area of the law.

In his dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), Justice BRENNAN proposed a brand new constitutional rule.* He argued that a mistake such as the one that a majority of the Court believes that the California Coastal Commission made in this case should automatically give rise to pecuniary liability for a "temporary taking." *Id.*, at 653–661, 101 S.Ct., at 1304–1309. Notwithstanding the unprecedented chilling effect that such a rule will obviously have on public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment[867] and the public welfare, six Members of the Court recently endorsed Justice BRENNAN's novel proposal. See *First English Evangelical Lutheran Church, supra.*

I write today to identify the severe tension between that dramatic development in the law and the view expressed by Justice BRENNAN's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. See *ante*, at 3153–3154. I like the hat that Justice BRENNAN has donned today better than the one he wore in *San Diego*, and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in *First English* is a shortsighted one. Like Justice BRENNAN, I hope that "a broader vision ultimately prevails." *Ante*, at 3161.

I respectfully dissent.

* "The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 450 U.S., at 658, 101 S.Ct., at 1307.

483 U.S. 868, 97 L.Ed.2d 709

[868]**Joseph G. GRIFFIN, Petitioner,**

v.

WISCONSIN.

No. 86–5324.

Argued April 20, 1987.

Decided June 26, 1987.

Probationer was convicted in the Circuit Court, Rock County, J. Richard Long, J., of possession of firearm by a felon, and he appealed. The Court of Appeals, 126 Wis.2d 183, 376 N.W.2d 62, affirmed, and probationer appealed. The Wisconsin Supreme Court, 131 Wis.2d 41, 388 N.W.2d 535, affirmed, and certiorari was granted. The Supreme Court, Justice Scalia, held that search of probationer's home, pursuant to Wisconsin regulation replacing standard of probable cause by "reasonable grounds," satisfied Fourth Amendment.

Affirmed.

APPENDIX #3

Dolan vs City of Tigard
114 SCt 2309 (United States Supreme Court 1994)

On May 9, 1983, at his first appearance before the court, Reed, appearing without counsel, informed the court that he would be in a halfway house but for the detainer. App. 12. The court acknowledged that there is a "world of difference" between a halfway house and the Fulton County jail. *Id.*, at 14. The court later observed that Reed's incarceration rendered him incapable of preparing his defense. *Id.*, at 54.

At the June 27 pretrial conference, Reed asked the court if it would prefer future motions orally or in writing. The court responded, "I want it in writing," and "I read better |372than I listen." *Id.*, at 39–40; see also *id.*, at 123 (noting preference for written motions). Conforming to this request, Reed filed a motion on July 25, requesting that "trial be held within the legal guidelines of the Agreement on Detainer Act." *Id.*, at 56. Clarifying his concerns, Reed complained that the State of Indiana was "forcing [him] to be tried beyond the limits as set forth in the Agreement on Detainer Act," and specifically "request[ed that] no extension of time be granted beyond those guidelines." *Ibid.* This *pro se* motion was filed 31 days before the 120–day period expired.

Three days later, Reed filed a motion stating that there was "limited time left for trial within the laws." *Id.*, at 88. This *pro se* motion was filed 28 days before the IAD clock ran out. Finally, on August 11, he filed a motion for subpoenas that sought prompt relief because the "Detainer Act time limits" were "approaching." *Id.*, at 91. This *pro se* motion was filed 15 days before the 120–day IAD time limit expired.

Thus, after being instructed that the court wanted all motions in writing, Reed filed three timely written motions indicating his desire to be tried within the IAD time limits. The Supreme Court of Indiana concluded that Reed's July 26 motion constituted "a general demand that trial be held within the time limits of the IAD." 491 N.E.2d 182, 185 (1993). Under *Mauro*, this was enough to put the court on notice of his demands. Even as an original matter, when a trial court instructs a *pro se* defendant to put his motions in writing, and the defendant does so, not once, but three times, it is wholly unwarranted then to penalize him for failing to object orally at what this Court later singles out as the magic moment.[11]

|373This should be a simple matter. Reed invoked, and the trial court denied, his right to be tried within the IAD's 120–day time limit. Section 2254 authorizes federal courts to grant for such a violation whatever relief law and justice require. The IAD requires dismissal of the indictment. Nothing in the IAD, in § 2254, or in our precedent requires or even suggests that federal courts should refrain from entertaining a state prisoner's claims of a violation of the IAD. Accordingly, I respectfully dissent.

512 U.S. 374, 129 L.Ed.2d 304

|374**Florence DOLAN, Petitioner**

v.

CITY OF TIGARD.

No. 93–518.

Argued March 23, 1994.

Decided June 24, 1994.

Landowner petitioned for judicial review of decision of Oregon Land Use Board of

11. The Court, referring to the "clarity" of Reed's August 29 motion seeking discharge of the indictment, suggests that he deliberately obscured his request until after the clock had run. *Ante*, at 2295, 2297. The Court fails to mention, however, that Reed prepared his earlier motions both without counsel and without adequate access to legal materials. It was only at the August 1 pretrial conference that the court ordered the sheriff to provide Reed with access to legal materials. App. 85. On August 9, Reed was given two lawbooks, including one on Indiana criminal procedure, and thereafter his draftsmanship improved

Appeals, affirming conditions placed by city on development of commercial property. The Court of Appeals, 113 Or.App. 162, 832 P.2d 853, affirmed, and landowner again appealed. The Oregon Supreme Court affirmed, 317 Or. 110, 854 P.2d 437, and certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) city's requirement that landowner dedicate portion of her property lying within flood plain for improvement of storm drainage system and property adjacent to flood plain as bicycle/pedestrian pathway, as condition for building permit allowing expansion of landowner's commercial property, had nexus with legitimate public purposes; (2) findings relied upon by city to require landowner to dedicate portion of her property in flood plain as public greenway, did not show required reasonable relationship necessary to satisfy requirements of Fifth Amendment; and (3) city failed to meet its burden of demonstrating that additional number of vehicle and bicycle trips generated by proposed commercial development reasonably related to city's requirement of dedication of pedestrian/bicycle pathway easement.

Reversed and remanded.

Justice Stevens filed dissenting opinion in which Justices Blackmun and Ginsburg joined.

Justice Souter filed dissenting opinion.

1. Eminent Domain ⇐1

One of the principal purposes of the takings clause of the Fifth Amendment is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by public as a whole. U.S.C.A. Const.Amends. 5, 14.

2. Eminent Domain ⇐2(1.2)
Zoning and Planning ⇐40

Land use regulation does not effect a taking if it substantially advances legitimate state interest and does not deny owner economically viable use of his or her land. U.S.C.A. Const.Amends. 5, 14.

3. Eminent Domain ⇐2(1.1, 1.2)

Under doctrine of "unconstitutional conditions," government may not require person to give up constitutional right in exchange for discretionary benefit conferred by government where property sought has little or no relationship to the benefit. U.S.C.A. Const. Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

4. Eminent Domain ⇐2(1.2)

In evaluating landowner's claim that city's requirement that she dedicate a portion of her property as condition of further development was unconstitutional taking, Supreme Court was first required to determine whether "essential nexus" existed between legitimate state interest and permit condition exacted by city; if Court found that nexus existed, it was then required to decide required degree of connection between exactions and projected impact of proposed development. U.S.C.A. Const.Amends. 5, 14.

5. Eminent Domain ⇐2(1.2)
Zoning and Planning ⇐382.3

City's requirement that landowner dedicate portion of her property lying within flood plain for improvement of storm drainage system and property adjacent to flood plain as bicycle/pedestrian pathway, as condition for building permit allowing expansion of landowner's commercial property, had nexus with legitimate public purposes of preventing flooding along creek and reducing traffic congestion in city's central business district, for purposes of Fifth Amendment takings analysis. U.S.C.A. Const.Amends. 5, 14.

6. Eminent Domain ⇐2(1.2)
Zoning and Planning ⇐382.3

"Rough proportionality" test applied in determining whether degree of exactions required by city's building permit conditions bore required relationship to projected impact on proposed development to satisfy takings clause of Fifth Amendment; no precise mathematical calculation was required, but city was required to make some sort of indi-

vidualized determination that required dedication was related both in nature and extent to impact of proposed development. U.S.C.A. Const.Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

7. Constitutional Law ⇐82(6.1)

Simply denominating governmental interest as "business regulation" does not immunize it from constitutional challenge on grounds that it violates provision of the Bill of Rights. U.S.C.A. Const.Amends. 1–10.

8. Eminent Domain ⇐56

Zoning and Planning ⇐439

Findings relied upon by city to require landowner to dedicate portion of her property in flood plain as public greenway, as condition for constructing new commercial building, did not show required reasonable relationship between flood plain easement and landowner's proposed new building necessary to satisfy requirement of Fifth Amendment "takings" clause; although city found that paved parking lot that was included in proposed development would increase storm water flow from property, city never stated why public greenway, as opposed to private one, was required in interest of flood control. U.S.C.A. Const.Amends. 5, 14.

9. Zoning and Planning ⇐382.3

City failed to meet its burden of demonstrating that additional number of vehicle and bicycle trips generated by proposed commercial development were reasonably related to city's requirement of dedication of pedestrian/bicycle pathway easement as condition of granting building permit; city simply found that creation of pathway could offset some of the traffic demand and lessen increase in traffic congestion, but did not find that pathway was likely to offset traffic demand. U.S.C.A. Const.Amends. 5, 14.

10. Zoning and Planning ⇐382.3

Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from proposed property use. U.S.C.A. Const. Amends. 5, 14.

Syllabus *

The City Planning Commission of respondent city conditioned approval of petitioner Dolan's application to expand her store and pave her parking lot upon her compliance with dedication of land (1) for a public greenway along Fanno Creek to minimize flooding that would be exacerbated by the increases in impervious surfaces associated with her development and (2) for a pedestrian/bicycle pathway intended to relieve traffic congestion in the city's Central Business District. She appealed the commission's denial of her request for variances from these standards to the Land Use Board of Appeals (LUBA), alleging that the land dedication requirements were not related to the proposed development and therefore constituted an uncompensated taking of her property under the Fifth Amendment LUBA found a reasonable relationship between (1) the development and the requirement to dedicate land for a greenway, since the larger building and paved lot would increase the impervious surfaces and thus the runoff into the creek, and (2) alleviating the impact of increased traffic from the development and facilitating the provision of a pathway as an alternative means of transportation. Both the Oregon Court of Appeals and the Oregon Supreme Court affirmed.

Held: The city's dedication requirements constitute an uncompensated taking of property. Pp. 2316–2322.

(a) Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the property sought has little or no

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

See *United States v Detroit Lumber Co*, 200 U S 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499

relationship to the benefit. In evaluating Dolan's claim, it must be determined whether an "essential nexus" exists between a legitimate state interest and the permit condition. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S.Ct. 3141, 3148, 97 L.Ed.2d 677. If one does, then it must be decided whether the degree of the exactions demanded by the permit conditions bears the required relationship to the projected impact of the proposed development. *Id.*, at 834, 107 S.Ct. at 3147. Pp. 2316–2317.

(b) Preventing flooding along Fanno Creek and reducing traffic congestion in the district are legitimate public purposes; and a nexus exists between the first purpose and limiting development within the creek's [375]floodplain and between the second purpose and providing for alternative means of transportation. Pp. 2317–2318.

(c) In deciding the second question—whether the city's findings are constitutionally sufficient to justify the conditions imposed on Dolan's permit—the necessary connection required by the Fifth Amendment is "rough proportionality." No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the proposed development's impact. This is essentially the "reasonable relationship" test adopted by the majority of the state courts. Pp. 2318–2320.

(d) The findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and Dolan's proposed building. The Community Development Code already required that Dolan leave 15% of her property as open space, and the undeveloped floodplain would have nearly satisfied that requirement. However, the city has never said why a public, as opposed to a private, greenway is required in the interest of flood control. The difference to Dolan is the loss of her ability to exclude others from her property, yet the city has not attempted to make any individualized determination to support this part of its request. The city has also not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by Dolan's development reasonably relates to the city's requirement for a dedication of the pathway easement. The city must quantify its finding beyond a conclusory statement that the dedication could offset some of the traffic demand generated by the development. Pp. 2319–2322.

317 Ore. 110, 854 P.2d 437 (1993), reversed and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and GINSBURG, JJ., joined, *post*, p. 2322. SOUTER, J., filed a dissenting opinion, *post*, p. 2330.

David B. Smith, Tigard, OR, for petitioner.

Timothy V. Ramis, Portland, OR, for respondent.

[376]Edwin S. Kneedler, Washington, DC, for U.S., as amicus curiae by special leave of the Court.

For U.S. Supreme Court briefs, see:

1994 WL 249537 (Pet.Brief)

1994 WL 123754 (Resp.Brief)

1994 WL 82042 (Reply.Brief)

1994 WL 106731 (Resp.Supp.Brief)

[377]Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner challenges the decision of the Oregon Supreme Court which held that the city of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements. 317 Ore. 110, 854 P.2d 437 (1993). We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.

I

The State of Oregon enacted a comprehensive land use management program in 1973. Ore.Rev.Stat. §§ 197.005–197.860 (1991). The program required all Oregon cities and counties to adopt new comprehensive land use plans that were consistent with the statewide planning goals. §§ 197.175(1), 197.250. The plans are implemented by land use regulations which are part of an integrated hierarchy of legally binding goals, plans, and regulations. §§ 197.175, 197.175(2)(b). Pursuant to the State's requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, which limits total site coverage, including all structures and paved parking, to 85% of the parcel. CDC, ch. 18.66, App. to Pet. for Cert. G–16 to G–17. After the completion of a transportation study that identified [378] congestion in the Central Business District as a particular problem, the city adopted a plan for a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips. The CDC requires that new development facilitate this plan by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan.[1]

The city also adopted a Master Drainage Plan (Drainage Plan). The Drainage Plan noted that flooding occurred in several areas along Fanno Creek, including areas near petitioner's property. Record, Doc. No. F, ch. 2, pp. 2–5 to 2–8; 4–2 to 4–6; Figure 4–1. The Drainage Plan also established that the increase in impervious surfaces associated with continued urbanization would exacerbate these flooding problems. To combat these risks, the Drainage Plan suggested a series of improvements to the Fanno Creek Basin, including channel excavation in the area next to petitioner's property. App. to Pet. for Cert. G–13, G–38. Other recommendations included ensuring that the floodplain remains free of structures and that it be preserved as greenways to minimize flood damage to structures. Record, Doc. No. F, ch. 5, pp. 5–16 to 5–21. The Drainage Plan concluded that the cost of these improvements should be shared based on both direct and indirect benefits, with property owners along the waterways paying more due to the direct benefit that they would receive. *Id.*, ch. 8, p. 8–11. CDC Chapters 18.84 and 18.86 [379] and CDC § 18.164.100 and the Tigard Park Plan carry out these recommendations.

Petitioner Florence Dolan owns a plumbing and electric supply store located on Main Street in the Central Business District of the city. The store covers approximately 9,700 square feet on the eastern side of a 1.67–acre parcel, which includes a gravel parking lot. Fanno Creek flows through the southwestern corner of the lot and along its western boundary. The year-round flow of the creek renders the area within the creek's 100–year floodplain virtually unusable for commercial development. The city's comprehensive plan includes the Fanno Creek floodplain as part of the city's greenway system.

Petitioner applied to the city for a permit to redevelop the site. Her proposed plans called for nearly doubling the size of the store to 17,600 square feet and paving a 39–space parking lot. The existing store, located on the opposite side of the parcel, would be razed in sections as construction progressed on the new building. In the second phase of the project, petitioner proposed to build an additional structure on the northeast side of

1. CDC § 18.86.040.A.1.b provides: "The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bikepaths or adjacent to a designated greenway/open space/park. Specific items to be addressed [include]: (i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths." App. to Brief for Respondent B–33 to B–34.

the site for complementary businesses and to provide more parking. The proposed expansion and intensified use are consistent with the city's zoning scheme in the Central Business District. CDC § 18.66.030, App. to Brief for Petitioner C–1 to C–3.

The City Planning Commission (Commission) granted petitioner's permit application subject to conditions imposed by the city's CDC. The CDC establishes the following standard for site development review approval:

> "Where landfill and/or development is allowed within and adjacent to the 100–year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the [380] floodplain in accordance with the adopted pedestrian/bicycle plan." CDC § 18.120.180.A.8, App. to Brief for Respondent B–45 to B–46.

Thus, the Commission required that petitioner dedicate the portion of her property lying within the 100–year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15–foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.[2] The dedication required by that condition encompasses approximately 7,000 square feet, or roughly 10% of the property. In accordance with city practice, petitioner could rely on the dedicated property to meet the 15% open space and landscaping requirement mandated by the city's zoning scheme. App. to Pet. for Cert. G–28 to G–29. The city would bear the cost of maintaining a landscaped buffer between the dedicated area and the new store. *Id.*, at G–44 to G–45.

Petitioner requested variances from the CDC standards. Variances are granted only where it can be shown that, owing to special circumstances related to a specific piece of the land, the literal interpretation of the applicable zoning provisions would cause "an undue or unnecessary hardship" unless the variance is granted. CDC § 18.134.010, App. to Brief for Respondent B–47.[3] Rather than posing alternative [381] mitigating measures to offset the expected impacts of her proposed development, as allowed under the CDC, petitioner simply argued that her proposed development would not conflict with the policies of the comprehensive plan. *Id.*, at E–4. The Commission denied the request.

The Commission made a series of findings concerning the relationship between the dedicated conditions and the projected impacts of petitioner's project. First, the Commission noted that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs."

2. The city's decision includes the following relevant conditions "1 The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100–year floodplain [of Fanno Creek] (*i e*, all portions of the property below elevation 150 0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary The building shall be designed so as not to intrude into the greenway area" App to Pet for Cert G–43

3. CDC § 18 134 050 contains the following criteria whereby the decisionmaking authority can approve, approve with modifications, or deny a variance request

"(1) The proposed variance will not be materially detrimental to the purposes of this title, be in conflict with the policies of the comprehensive plan, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity,

"(2) There are special circumstances that exist which are peculiar to the lot size or shape topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district,

"(3) The use proposed will be the same as permitted under this title and City standards will be maintained to the greatest extent possible, while permitting some economic use of the land,

"(4) Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land forms, or parks will not be adversely affected any more than would occur if the development were located as specified in the title, and

"(5) The hardship is not self-imposed and the variance requested is the minimum variance which would alleviate the hardship" App to Brief for Respondent B–49 to B–50

City of Tigard Planning Commission Final Order No. 91–09 PC, App. to Pet. for Cert. G–24. The Commission noted that the site plan has provided for bicycle parking in a rack in front of the proposed building and "[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed." *Ibid.* In addition, the Commission found that creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation "could [382] offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion." *Ibid.*

The Commission went on to note that the required floodplain dedication would be reasonably related to petitioner's request to intensify the use of the site given the increase in the impervious surface. The Commission stated that the "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes." *Id.*, at G–37. Based on this anticipated increased storm water flow, the Commission concluded that "the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." *Ibid.* The Tigard City Council approved the Commission's final order, subject to one minor modification; the city council reassigned the responsibility for surveying and marking the floodplain area from petitioner to the city's engineering department. *Id.*, at G–7.

Petitioner appealed to the Land Use Board of Appeals (LUBA) on the ground that the city's dedication requirements were not related to the proposed development, and, therefore, those requirements constituted an uncompensated taking of her property under the Fifth Amendment. In evaluating the federal taking claim, LUBA assumed that the city's findings about the impacts of the proposed development were supported by substantial evidence. *Dolan v. Tigard*, LUBA 91–161 (Jan. 7, 1992), reprinted at App. to Pet. for Cert. D–15, n. 9. Given the undisputed fact that the proposed larger building and paved parking area would increase the amount of impervious surfaces and the runoff into Fanno Creek, LUBA concluded that "there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway." *Id.*, at D–16. With respect to the pedestrian/bicycle pathway, LUBA noted the Commission's finding that a significantly [383] larger retail sales building and parking lot would attract larger numbers of customers and employees and their vehicles. It again found a "reasonable relationship" between alleviating the impacts of increased traffic from the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation. *Ibid.*

The Oregon Court of Appeals affirmed, rejecting petitioner's contention that in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), we had abandoned the "reasonable relationship" test in favor of a stricter "essential nexus" test. 113 Ore.App. 162, 832 P.2d 853 (1992). The Oregon Supreme Court affirmed. 317 Ore. 110, 854 P.2d 437 (1993). The court also disagreed with petitioner's contention that the *Nollan* Court abandoned the "reasonably related" test. 317 Ore., at 118, 854 P.2d, at 442. Instead, the court read *Nollan* to mean that an "exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." 317 Ore., at 120, 854 P.2d, at 443. The court decided that both the pedestrian/bicycle pathway condition and the storm drainage dedication had an essential nexus to the development of the proposed site. *Id.*, at 121, 854 P.2d, at 443. Therefore, the court found the conditions to be reasonably related to the impact of the expansion of petitioner's business. *Ibid.*[4]

4. The Supreme Court of Oregon did not address the consequences of petitioner's failure to provide alternative mitigation measures in her variance application and we take the case as it comes to us. Accordingly, we do not pass on the constitutionality of the city's variance provisions

We granted certiorari, 510 U.S. 989, 114 S.Ct. 544, 126 L.Ed.2d 446 (1993), because of an alleged conflict between the Oregon Supreme Court's decision and our decision in *Nollan, supra.*

II

[1] The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago,* 384 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." [5] One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. *Nollan, supra,* 483 U.S., at 831, 107 S.Ct., at 3145. Such public access would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States,* 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979).

[2] On the other side of the ledger, the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished 385 without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). A land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).[6]

[3] The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan, supra,* we

5. Justice STEVENS' dissent suggests that this case is actually grounded in "substantive" due process, rather than in the view that the Takings Clause of the Fifth Amendment was made applicable to the States by the Fourteenth Amendment. But there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States, see *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 827, 107 S.Ct. 3141, 3143, 97 L.Ed.2d 677 (1987). Nor is there any doubt that these cases have relied upon *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), to reach that result. See, *e.g., Penn Central, supra,* 438 U.S., at 122, 98 S.Ct., at 2658 ("The issu[e] presented ... [is] whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a 'taking' of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, see *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897)").

6. There can be no argument that the permit conditions would deprive petitioner of "economically beneficial us[e]" of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive *some* economic use from her property. See, *e.g., Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992); *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979); *Penn Central Transp. Co. v. New York City, supra,* 438 U.S., at 124, 98 S.Ct., at 2659.

held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. See *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth |386 Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified "no special benefits" conferred on her, and has not identified any "special quantifiable burdens" created by her new store that would justify the particular dedications required from her which are not required from the public at large.

III

[4] In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. *Nollan*, 483 U.S., at 837, 107 S.Ct., at 3148. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. *Id.*, at 838, 107 S.Ct., at 3149. Here, however, we must decide this question.

A

[5] We addressed the essential nexus question in *Nollan*. The California Coastal Commission demanded a lateral public easement across the Nollans' beachfront lot in exchange for a permit to demolish an existing bungalow and replace it with a three-bedroom house. *Id.*, at 828, 107 S.Ct., at 3144. The public easement was designed to connect two public beaches that were separated by the Nollan's property. The Coastal Commission had asserted that the public easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house.

We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate |387 public interest. *Id.*, at 835, 107 S.Ct., at 3148. We also agreed that the permit condition would have been constitutional "even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.*, at 836, 107 S.Ct., at 3148. We resolved, however, that the Coastal Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot. *Id.*, at 837, 107 S.Ct., at 3148. How enhancing the public's ability to "traverse to and along the shorefront" served the same governmental purpose of "visual access to the ocean" from the roadway was beyond our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into " 'an out-and-out plan of extortion.' " *Ibid.*, quoting *J.E.D Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14–15 (1981).

No such gimmicks are associated with the permit conditions imposed by the city in this case. Undoubtedly, the prevention of flood-

ing along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. *Agins*, 447 U.S., at 260–262, 100 S.Ct., at 2141–2142. It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100–year floodplain. Petitioner proposes to double the size of her retail store and to pave her now-gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of storm water runoff into Fanno Creek.

The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation. In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers: "Pedestrians and bicyclists occupying dedicated [388] spaces for walking and/or bicycling ... remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow." A. Nelson, Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits 11, Center for Planning Development, Georgia Institute of Technology, Working Paper Series (Jan. 1994). See also Intermodal Surface Transportation Efficiency Act of 1991, Pub.L. 102–240, 105 Stat.1914 (recognizing pedestrian and bicycle facilities as necessary components of any strategy to reduce traffic congestion).

B

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development. *Nollan, supra*, 483 U.S., at 834, 107 S.Ct., at 3147, quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) (" '[A] use restriction may constitute a "taking" if not reasonably necessary to the effectuation of a substantial government purpose' "). Here the Oregon Supreme Court deferred to what it termed the "city's unchallenged factual findings" supporting the dedication conditions and found them to be reasonably related to the impact of the expansion of petitioner's business. 317 Ore., at 120–121, 854 P.2d, at 443.

The city required that petitioner dedicate "to the City as Greenway all portions of the site that fall within the existing 100–year floodplain [of Fanno Creek] ... and all property 15 feet above [the floodplain] boundary." *Id.*, at 113, n. 3, 854 P.2d, at 439, n. 3. In addition, the city demanded that the retail store be designed so as not to intrude into the greenway area. The city relies on the Commission's rather tentative findings that increased storm water flow from petitioner's property "can only add to the public need to manage the [floodplain] for drainage purposes" to support its conclusion that the "requirement of dedication of the floodplain area on [389] the site is related to the applicant's plan to intensify development on the site." City of Tigard Planning Commission Final Order No. 91–09 PC, App. to Pet. for Cert. G–37.

The city made the following specific findings relevant to the pedestrian/bicycle pathway:

> "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." *Id.*, at G–24.

The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit. Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. See, *e.g.*, *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964);

Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966). We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. The Supreme Court of Illinois first developed this test in *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill.2d 375, 380, 176 N.E.2d 799, 802 (1961).[7] Under this standard, [390]if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." *Id.*, at 381, 176 N.E.2d, at 802. We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.

A number of state courts have taken an intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development. Typical is the Supreme Court of Nebraska's opinion in *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980), where that court stated:

> "The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit."

Thus, the court held that a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not "occasioned by the construction sought to be permitted." *Id.*, at 248, 292 N.W.2d, at 302.

Some form of the reasonable relationship test has been adopted in many other jurisdictions. See, *e.g.*, *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976) (requiring a showing of a reasonable relationship between [391]the planned subdivision and the municipality's need for land); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex.1984); *Call v. West Jordan*, 606 P.2d 217, 220 (Utah 1979) (affirming use of the reasonable relation test). Despite any semantical differences, general agreement exists among the courts "that the dedication should have some reasonable relationship to the needs created by the [development]." *Ibid.* See generally Note " 'Take' My Beach Please!": *Nollan v. California Coastal Commission* and a Rational-Nexus Constitutional Analysis of Development Exactions, 69 B.U.L.Rev. 823 (1989); see also *Parks v. Watson*, 716 F.2d 646, 651–653 (CA9 1983).

[6] We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedi-

7. The "specifically and uniquely attributable" test has now been adopted by a minority of other courts. See, *e.g.*, *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 585, 432 A.2d 12, 15 (1981); *Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne*, 66 N.J. 582, 600–601, 334 A.2d 30, 40 (1975); *McKain v. Toledo City Plan Comm'n*, 26 Ohio App.2d 171, 176, 270 N.E.2d 370, 374 (1971); *Frank Ansuini, Inc. v. Cranston*, 107 R.I. 63, 69, 264 A.2d 910, 913 (1970)

cation is related both in nature and extent to the impact of the proposed development.[8]

[7] |392Justice STEVENS' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are "a species of business regulation that heretofore warranted a strong presumption of constitutional validity." *Post*, at 2325. But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights. In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), we held that a statute authorizing a warrantless search of business premises in order to detect OSHA violations violated the Fourth Amendment. See also *Air Pollution Variance Bd., of Colo. v. Western Alfalfa Corp.*, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974); *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). And in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we held that an order of the New York Public Service Commission, designed to cut down the use of electricity because of a fuel shortage, violated the First Amendment insofar as it prohibited advertising by a utility company to promote the use of electricity. We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances. We turn now to analysis of whether the findings relied upon by the city here, first with respect to the floodplain easement, and second with respect to the pedestrian/bicycle path, satisfied these requirements.

[8] It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property. Record, Doc. No. F, ch. 4, |393p. 4–29. Therefore, keeping the floodplain open and free from development would likely confine the pressures on Fanno Creek created by petitioner's development. In fact, because petitioner's property lies within the Central Business District, the CDC already required that petitioner leave 15% of it as open space and the undeveloped floodplain would have nearly satisfied that requirement. App. to Pet. for Cert. G–16 to G–17. But the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S., at 176, 100 S.Ct., at 391. It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to

8. Justice STEVENS' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, *e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See *Nollan*, 483 U.S., at 836, 107 S.Ct., at 3148. This conclusion is not, as he suggests, undermined by our decision in *Moore v. East Cleveland*, 431 U.S 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), in which we struck down a housing ordinance that limited occupancy of a dwelling unit to members of a single family as violating the Due Process Clause of the Fourteenth Amendment. The ordinance at issue in *Moore* intruded on choices concerning family living arrangements, an area in which the usual deference to the legislature was found to be inappropriate. *Id.*, at 499, 97 S.Ct., at 1935.

make any individualized determination to support this part of its request.

The city contends that the recreational easement along the greenway is only ancillary to the city's chief purpose in controlling flood hazards. It further asserts that unlike the residential property at issue in *Nollan*, petitioner's property is commercial in character, and therefore, her right to exclude others is compromised. Brief for Respondent 41, quoting *United States v. Orito*, 413 U.S. 139, 142, 93 S.Ct. 2674, 2677, 37 L.Ed.2d 513 (1973) (" 'The Constitution extends special safeguards to the privacy of the home' "). The city maintains that "[t]here is nothing to suggest that preventing [petitioner] from prohibiting [the easements] will unreasonably impair the value of [her] property as a [retail store]." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2042, 64 L.Ed.2d 741 (1980).

[394] Admittedly, petitioner wants to build a bigger store to attract members of the public to her property. She also wants, however, to be able to control the time and manner in which they enter. The recreational easement on the greenway is different in character from the exercise of state-protected rights of free expression and petition that we permitted in *PruneYard*. In *PruneYard*, we held that a major private shopping center that attracted more than 25,000 daily patrons had to provide access to persons exercising their state constitutional rights to distribute pamphlets and ask passers-by to sign their petitions. *Id.*, at 85, 100 S.Ct., at 2042. We based our decision, in part, on the fact that the shopping center "may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." *Id.*, at 83, 100 S.Ct., at 2042. By contrast, the city wants to impose a permanent recreational easement upon petitioner's property that borders Fanno Creek. Petitioner would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would n be regulated, it would be eviscerated.

If petitioner's proposed development ha somehow encroached on existing greenwa space in the city, it would have been reason able to require petitioner to provide som alternative greenway space for the publi either on her property or elsewhere. See *Nollan*, 483 U.S., at 836, 107 S.Ct., at 3148 ("Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end"). But that is not the case here. We conclude that the findings upon which the city relies[395] do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.

[9, 10] With respect to the pedestrian/bicycle pathway, we have no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District. The city estimates that the proposed development would generate roughly 435 additional trips per day.[9] Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use. But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic

9. The city uses a weekday average trip rate of 53.21 trips per 1,000 square feet. Additional Trips Generated = 53.21 X (17,600–9,720) App to Pet. for Cert. G–15.

demand . . . and lessen the increase in traffic congestion." [10]

As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, "[t]he findings of fact that the bicycle pathway system '*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand." 317 Ore., at 127, 854 P.2d, at 447 (emphasis in original). No precise mathematical calculation is required, but the city must make some effort to quantify its findings in [396] support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

IV

Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization, particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S., at 416, 43 S.Ct., at 160.

The judgment of the Supreme Court of Oregon is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice BLACKMUN and Justice GINSBURG join, dissenting.

The record does not tell us the dollar value of petitioner Florence Dolan's interest in excluding the public from the greenway adjacent to her hardware business. The mountain of briefs that the case has generated nevertheless makes it obvious that the pecuniary value of her victory is far less important than the rule of law that this case has been used to establish. It is unquestionably an important case.

Certain propositions are not in dispute. The enlargement of the Tigard unit in Dolan's chain of hardware stores will have an adverse impact on the city's legitimate and substantial interests in controlling drainage in Fanno Creek and minimizing traffic congestion in Tigard's business district. That impact is sufficient to justify an outright denial of her application for approval of the expansion. The city has nevertheless [397] agreed to grant Dolan's application if she will comply with two conditions, each of which admittedly will mitigate the adverse effects of her proposed development. The disputed question is whether the city has violated the Fourteenth Amendment to the Federal Constitution by refusing to allow Dolan's planned construction to proceed unless those conditions are met.

The Court is correct in concluding that the city may not attach arbitrary conditions to a building permit or to a variance even when it can rightfully deny the application outright. I also agree that state court decisions dealing with ordinances that govern municipal development plans provide useful guidance in a case of this kind. Yet the Court's description of the doctrinal underpinnings of its decision, the phrasing of its fledgling test of "rough proportionality," and the application of that test to this case run contrary to the traditional treatment of these cases and break considerable and unpropitious new ground.

I

Candidly acknowledging the lack of federal precedent for its exercise in rulemaking, the Court purports to find guidance in 12 "repre-

10. In rejecting petitioner's request for a variance from the pathway dedication condition, the city stated that omitting the planned section of the pathway across petitioner's property would conflict with its adopted policy of providing a continuous pathway system But the Takings Clause requires the city to implement its policy by condemnation unless the required relationship between petitioner's development and added traffic is shown.

sentative" state court decisions. To do so is certainly appropriate.[1] The state cases the Court consults, however, either fail to support or decidedly undermine the Court's conclusions in key respects.

First, although discussion of the state cases permeates the Court's analysis of the appropriate test to apply in this case, the test on which the Court settles is not naturally derived from those courts' decisions. The Court recognizes as an initial matter that the city's conditions satisfy the "essential nexus" requirement announced in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), because they serve the legitimate interests in minimizing floods and traffic congestions.[398] *Ante*, at 2317–2318.[2] The Court goes on, however, to erect a new constitutional hurdle in the path of these conditions. In addition to showing a rational nexus to a public purpose that would justify an outright denial of the permit, the city must also demonstrate "rough proportionality" between the harm caused by the new land use and the benefit obtained by the condition. *Ante*, at 2319. The Court also decides for the first time that the city has the burden of establishing the constitutionality of its conditions by making an "individualized determination" that the condition in question satisfies the proportionality requirement. See *Ibid.*

Not one of the state cases cited by the Court announces anything akin to a "rough proportionality" requirement. For the most part, moreover, those cases that invalidated municipal ordinances did so on state law or unspecified grounds roughly equivalent to *Nollan*'s "essential nexus" requirement. See, *e.g.*, *Simpson v. North Platte*, 206 Neb. 240, 245–248, 292 N.W.2d 297, 301–302 (1980) (ordinance lacking "reasonable relationship" or "rational nexus" to property's use violated Nebraska Constitution); *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 583–585, 432 A.2d 12, 14–15 (1981) (state constitutional grounds). One case purporting[399] to apply the strict "specifically and uniquely attributable" test established by *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961), nevertheless found that test was satisfied because the legislature had decided that the subdivision at issue created the need for a park or parks. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 33–36, 394 P.2d 182, 187–188 (1964). In only one of the seven cases upholding a land use regulation did the losing property owner petition this Court for certiorari. See *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dism'd, 385 U.S. 4, 87 S.Ct. 36, 17 L.Ed.2d 3 (1966) (want of substantial federal question). Although 4 of the 12 opinions mention the Federal Constitution—2 of those only in passing—it is quite obvious that neither the courts nor the litigants imagined they might be participating in the development of a new rule of federal law. Thus, although these state cases do lend support to the Court's reaffirmance of *Nollan*'s reasonable nexus requirement, the role the Court accords them in the announcement of its newly minted second phase of the constitutional inquiry is remarkably inventive.

1. Cf. *Moore v. East Cleveland*, 431 U.S. 494, 513–521, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (STEVENS, J., concurring in judgment).

2. In *Nollan* the Court recognized that a state agency may condition the grant of a land use permit on the dedication of a property interest if the dedication serves a legitimate police-power purpose that would justify a refusal to issue the permit. For the first time, however, it held that such a condition is unconstitutional if the condition "utterly fails" to further a goal that would justify the refusal. 483 U.S., at 837, 107 S.Ct., at 3148. In the *Nollan* Court's view, a condition would be constitutional even if it required the Nollans to provide a viewing spot for passers-by whose view of the ocean was obstructed by their new house. *Id.*, at 836, 107 S.Ct., at 3148. "Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Ibid.*

In addition, the Court ignores the state courts' willingness to consider what the property owner gains from the exchange in question. The Supreme Court of Wisconsin, for example, found it significant that the village's approval of a proposed subdivision plat "enables the subdivider to profit financially by selling the subdivision lots as home-building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands." *Jordan v. Menomonee Falls*, 28 Wis.2d, at 619–620, 137 N.W.2d, at 448. The required dedication as a condition of that approval was permissible "[i]n return for this benefit." *Ibid.* See also *Collis v. Bloomington*, 310 Minn. 5, 11–13, 246 N.W.2d 19, 23–24 (1976) (citing *Jordan*); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 806 (Tex.1984) (dedication requirement only triggered when developer *chooses* [400] to develop land). In this case, moreover, Dolan's acceptance of the permit, with its attached conditions, would provide her with benefits that may well go beyond any advantage she gets from expanding her business. As the United States pointed out at oral argument, the improvement that the city's drainage plan contemplates would widen the channel and reinforce the slopes to increase the carrying capacity during serious floods, "confer[ring] considerable benefits on the property owners immediately adjacent to the creek." Tr. of Oral Arg. 41–42.

The state court decisions also are enlightening in the extent to which they required that the *entire parcel* be given controlling importance. All but one of the cases involve challenges to provisions in municipal ordinances requiring developers to dedicate either a percentage of the entire parcel (usually 7 or 10 percent of the platted subdivision) or an equivalent value in cash (usually a certain dollar amount per lot) to help finance the construction of roads, utilities, schools, parks, and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment. See, *e.g.*, *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966); *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976). None of the decisions identified the surrender of the fee owner's "power to exclude" as having any special significance. Instead, the courts uniformly examined the character of the entire economic transaction.

II

It is not merely state cases, but our own cases as well, that require the analysis to focus on the impact of the city's action on the entire parcel of private property. In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), we stated that takings jurisprudence "does not divide a single parcel [401] into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.*, at 130–131, 98 S.Ct., at 2662. Instead, this Court focuses "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Ibid.* *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), reaffirmed the nondivisibility principle outlined in *Penn Central*, stating that "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." 444 U.S., at 65–66, 100 S.Ct., at 327.[3] As recently as last Term, we approved the principle again. See *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 644, 113 S.Ct. 2264, 2290, 124 L.Ed.2d 539 (1993) (explaining that "a claimant's parcel of property [cannot] first be divided into what was taken and what was left" to demonstrate a compensable taking). Although limitation of the right to exclude others undoubtedly constitutes a significant

3. Similarly, in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 498–499, 107 S.Ct. 1232, 1249, 94 L.Ed.2d 472 (1987), we concluded that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes" and that "[t]here is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property."

infringement upon property ownership, *Kaiser Aetna v. United States*, 444 U.S. 164, 179–180, 100 S.Ct. 383, 393, 62 L.Ed.2d 332 (1979), restrictions on that right do not alone constitute a taking, and do not do so in any event unless they "unreasonably impair the value or use" of the property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82–84, 100 S.Ct. 2035, 2041–2042, 64 L.Ed.2d 741 (1980).

The Court's narrow focus on one strand in the property owner's bundle of rights is particularly misguided in a case involving the development of commercial property. As Professor Johnston has noted:

> "The subdivider is a manufacturer, processer, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is [402]not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations." Johnston, Constitutionality of Subdivision Control Exactions: The Quest for A Rationale, 52 Cornell L.Q. 871, 923 (1967).[4]

The exactions associated with the development of a retail business are likewise a species of business regulation that heretofore warranted a strong presumption of constitutional validity.

In Johnston's view, "if the municipality can demonstrate that its assessment of financial burdens against subdividers is rational, impartial, and conducive to fulfillment of authorized planning objectives, its action need be invalidated only in those extreme and presumably rare cases where the burden of compliance is sufficiently great to deter the owner from proceeding with his planned development." *Id.*, at 917. The city of Tigard has demonstrated that its plan is rational and impartial and that the conditions at issue are "conducive to fulfillment of authorized planning objectives." Dolan, on the other hand, has offered no evidence that her burden of compliance has any impact at all on the value or profitability of her planned development. Following the teaching of the cases on which it purports to rely, the Court should not isolate the burden associated with the loss of the power to exclude[403] from an evaluation of the benefit to be derived from the permit to enlarge the store and the parking lot.

The Court's assurances that its "rough proportionality" test leaves ample room for cities to pursue the "commendable task of land use planning," *ante*, at 2322—even twice avowing that "[n]o precise mathematical calculation is required," *ante*, at 2319, 2322—are wanting given the result that test compels here. Under the Court's approach, a city must not only "quantify its findings," *ante*, at 2322, and make "individualized determination[s]" with respect to the nature *and* the extent of the relationship between the conditions and the impact, *ante*, at 2319, 2320, but also demonstrate "proportionality." The correct inquiry should instead concentrate on whether the required nexus is present and venture beyond considerations of a condition's nature or germaneness only, if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city.[5]

4. Johnston's article also sets forth a fair summary of the state cases from which the Court purports to derive its "rough proportionality" test. See 52 Cornell L.Q., at 917. Like the Court, Johnston observed that cases requiring a "rational nexus" between exactions and public needs created by the new subdivision—especially *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965)—"stee[r] a moderate course" between the "judicial obstructionism" of *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961), and the "excessive deference" of *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964). 52 Cornell L.Q., at 917.

5. Dolan's attorney overstated the danger when he suggested at oral argument that without some requirement for proportionality, "[t]he City could have found that Mrs. Dolan's new store would have increased traffic by one additional vehicle trip per day [and] could have required her to dedicate 75, 95 percent of her land for a widening of Main Street." Tr. of Oral Arg. 52–53

The heightened requirement the Court imposes on cities is even more unjustified when all the tools needed to resolve the questions presented by this case can be garnered from our existing case law.

III

Applying its new standard, the Court finds two defects in the city's case. First, while the record would adequately support a requirement that Dolan maintain the portion of the floodplain on her property as undeveloped open space, it does not support the additional requirement that the floodplain be dedicated to the city. *Ante*, at 2320–2322. Second, [404]while the city adequately established the traffic increase that the proposed development would generate, it failed to quantify the offsetting decrease in automobile traffic that the bike path will produce. *Ante*, at 2321–2322. Even under the Court's new rule, both defects are, at most, nothing more than harmless error.

In her objections to the floodplain condition, Dolan made no effort to demonstrate that the dedication of that portion of her property would be any more onerous than a simple prohibition against any development on that portion of her property. Given the commercial character of both the existing and the proposed use of the property as a retail store, it seems likely that potential customers "trampling along petitioner's floodplain," *ante*, at 2320, are more valuable than a useless parcel of vacant land. Moreover, the duty to pay taxes and the responsibility for potential tort liability may well make ownership of the fee interest in useless land a liability rather than an asset. That may explain why Dolan never conceded that she could be prevented from building on the floodplain. The city attorney also pointed out that absent a dedication, property owners would be required to "build on their own land" and "with their own money" a storage facility for the water runoff. Tr. of Oral Arg. 30–31. Dolan apparently "did have that option," but chose not to seek it. *Id.*, at 31. If Dolan might have been entitled to a variance confining the city's condition in a manner this Court would accept, her failure to seek that narrower form of relief at any stage of the state administrative and judicial proceedings clearly should preclude that relief in this Court now.

The Court's rejection of the bike path condition amounts to nothing more than a play on words. Everyone agrees that the bike path "could" offset some of the increased traffic flow that the larger store will generate, but the findings do not unequivocally state that it *will* do so, or tell us just how many cyclists will replace motorists. Predictions on such matters are inherently nothing more than estimates. Certainly[405] the assumption that there will be an offsetting benefit here is entirely reasonable and should suffice whether it amounts to 100 percent, 35 percent, or only 5 percent of the increase in automobile traffic that would otherwise occur. If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.

IV

The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago.[6]

The Court begins its constitutional analysis by citing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897), for the proposition that the Takings Clause of the Fifth Amendment is "applicable to the States through the Fourteenth

6. See, *e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963)

Amendment." *Ante*, at 2316. That opinion, however, contains no mention of either the Takings Clause or the Fifth Amendment; [7] it held that the protection afforded by the Due Process Clause of the Fourteenth Amendment extends to matters of substance as well as procedure,[8] and that the substance 406 of "the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State." 166 U.S., at 235, 236–241, 17 S.Ct., at 584, 584–586. It applied the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker's liberty interest in working 60 hours a week and 10 hours a day. See *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).[9]

Later cases have interpreted the Fourteenth Amendment's substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the Fifth Amendment's Takings Clause. See, *e.g.*, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 481, n. 10, 107 S.Ct. 1232, 1240, n. 10, 94 L.Ed.2d 472 (1987). There was nothing problematic about that interpretation in cases enforcing the Fourteenth Amendment against state action that involved the actual physical invasion of private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427–433, 102 S.Ct. 3164, 3172–3175, 73 L.Ed.2d 868 (1982); *Kaiser Aetna v. United States*, 444 U.S., at 178–180, 100 S.Ct., at 392–393. Justice Holmes charted a significant new course, however, when he opined that a state law making it "commercially impracticable to mine certain coal" had "very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). The so-called "regulatory 407 takings" doctrine that the Holmes dictum [10] kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.

This case inaugurates an even more recent judicial innovation than the regulatory takings doctrine: the application of the "unconstitutional conditions" label to a mutually beneficial transaction between a property owner and a city. The Court tells us that the city's refusal to grant Dolan a discretionary benefit infringes her right to receive just compensation for the property interests that she has refused to dedicate to the city "where the property sought has little or no relationship to the benefit." [11] Although it is

7. An earlier case deemed it "well settled" that the Takings Clause "is a limitation on the power of the Federal government, and not on the States." *Pumpelly v Green Bay Co.*, 13 Wall. 166, 177, 20 L.Ed. 557 (1872).

8. The Court held that a State "may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form." *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 234–235, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897).

9. The *Lochner* Court refused to presume that there was a reasonable connection between the regulation and the state interest in protecting the public health. 198 U.S., at 60–61, 25 S.Ct., at 544. A similar refusal to identify a sufficient nexus between an enlarged building with a newly paved parking lot and the state interests in minimizing the risks of flooding and traffic congestion proves fatal to the city's permit conditions in this case under the Court's novel approach.

10. See *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S., at 484, 107 S.Ct., at 1241 (explaining why this portion of the opinion was merely "advisory").

11. *Ante*, at 2317. The Court's entire explanation reads: "Under the well-settled doctrine of 'un-

well settled that a government cannot deny a benefit on a basis that infringes constitutionally protected interests—"especially [one's] interest in freedom of speech," *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972)—the "unconstitutional conditions" doctrine provides an inadequate framework in which to analyze this case.[12]

[408] Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her constitutional right to compensation. See *Preseault v. ICC*, 494 U.S. 1, 11–17, 110 S.Ct. 914, 921–924, 108 L.Ed.2d 1 (1990) (finding takings claim premature because property owner had not yet sought compensation under Tucker Act); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294–295, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981) (no taking where no one "identified any property ... that has allegedly been taken").

Even if Dolan should accept the city's conditions in exchange for the benefit that she seeks, it would not necessarily follow that she had been denied "just compensation" since it would be appropriate to consider the receipt of that benefit in any calculation of "just compensation." See *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415, 43 S.Ct., at 160 (noting that an "average reciprocity of advantage" was deemed to justify many laws); *Hodel v. Irving*, 481 U.S. 704, 715, 107 S.Ct. 2076, 2082, 95 L.Ed.2d 668 (1987) (such " 'reciprocity of advantage' " weighed in favor of a statute's constitutionality).[409] Particularly in the absence of any evidence on the point, we should not presume that the discretionary benefit the city has offered is less valuable than the property interests that Dolan can retain or surrender at her option. But even if that discretionary benefit were so trifling that it could not be considered just compensation when it has "little or no relationship" to the property, the Court fails to explain why the same value would suffice when the required nexus is present. In this respect, the Court's reliance on the "unconstitutional conditions" doctrine is assuredly novel, and arguably incoherent. The city's conditions are by no means immune from constitutional scrutiny. The level of scrutiny, however, does not approximate the kind of review that would apply if the city had insisted on a surrender of Dolan's First Amendment rights in exchange for a building

constitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."

12. Although it has a long history, see *Home Ins Co v Morse*, 20 Wall 445, 451, 22 L.Ed. 365 (1874), the "unconstitutional conditions" doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question. See, *e.g.*, Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism, 70 B.U.L.Rev. 593, 620 (1990) (doctrine is "too crude and too general to provide help in contested cases"); Sullivan, Unconstitutional Conditions, 102 Harv. L.Rev. 1415, 1416 (1989) (doctrine is "riven with inconsistencies"); Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum.L.Rev. 321, 322 (1935) ("The Supreme Court has sustained many such exertions of power even after announcing the broad doctrine that would invalidate them"). As the majority's case citations suggest, *ante*, at 2316, modern decisions invoking the doctrine have most frequently involved First Amendment liberties, see also, *e g*, *Connick v Myers*, 461 U.S. 138, 143–144, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983), *Elrod v Burns*, 427 U.S. 347, 361–363, 96 S.Ct. 2673, 2684, 49 L Ed.2d 547 (1976) (plurality opinion), *Sherbert v Verner*, 374 U.S 398, 404, 83 S Ct 1790, 1794, 10 L.Ed.2d 965 (1963); *Speiser v Randall*, 357 U.S. 513, 518–519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958). But see *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328, 345–346, 106 S.Ct. 2968, 2979, 92 L.Ed.2d 266 (1986) ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling"). The necessary and traditional breadth of municipalities' power to regulate property development, together with the absence here of fragile and easily "chilled" constitutional rights such as that of free speech, make it quite clear that the Court is really writing on a clean slate rather than merely applying "well-settled" doctrine. *Ante*, at 2316.

permit. One can only hope that the Court's reliance today on First Amendment cases, see *ante*, at 2317 (citing *Perry v. Sindermann*, *supra*, and *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968)), and its candid disavowal of the term "rational basis" to describe its new standard of review, see *ante*, at 2319, do not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era.

The Court has decided to apply its heightened scrutiny to a single strand—the power to exclude—in the bundle of rights that enables a commercial enterprise to flourish in an urban environment. That intangible interest is undoubtedly worthy of constitutional protection—much like the grandmother's interest in deciding which of her relatives may share her home in *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Both interests are protected from arbitrary state action by the Due Process Clause of the Fourteenth Amendment. It is, however, a curious irony that Members of the majority in this case would impose an almost insurmountable burden of proof on the property owner in the *Moore* case [410] while saddling the city with a heightened burden in this case.[13]

In its application of what is essentially the doctrine of substantive due process, the Court confuses the past with the present. On November 13, 1922, the village of Euclid, Ohio, adopted a zoning ordinance that effectively confiscated 75 percent of the value of property owned by the Ambler Realty Company. Despite its recognition that such an ordinance "would have been rejected as arbitrary and oppressive" at an earlier date, the Court (over the dissent of Justices Van Devanter, McReynolds, and Butler) upheld the ordinance. Today's majority should heed the words of Justice Sutherland:

> "Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract [411] to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926).

In our changing world one thing is certain uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong pre-

13. The author of today's opinion joined Justice Stewart's dissent in *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). There the dissenters found it sufficient, in response to my argument that the zoning ordinance was an arbitrary regulation of property rights, that "if the ordinance is a rational attempt to promote 'the city's interest in preserving the character of its neighborhoods,' *Young v. American Mini Theatres [Inc.]* 427 U.S. 50, 71 [96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976)] (opinion of STEVENS, J.), it is ... a permissible restriction on the use of private property under *Euclid v. Ambler Realty Co.*, 272 U.S. 365 [47 S.Ct. 114, 71 L.Ed. 303 (1926)], and *Nectow v. Cambridge*, 277 U.S. 183 [48 S.Ct. 447, 72 L.Ed 842 (1928)]." *Id.*, 431 U.S., at 540, n. 10, 97 S.Ct., at 1956, n. 10. The dissent went on to state that my calling the city to task for failing to explain the need for enacting the ordinance "*place[d] the burden on the wrong party*." *Ibid.* (emphasis added). Recently, two other Members of today's majority severely criticized the holding in *Moore*. See *United States v. Carlton*, 512 U.S. 26, 40–42, 114 S.Ct. 2018, 2027, 129 L.Ed.2d 22 (1994) (SCALIA, J., concurring in judgment); see also *id.*, at 39, 114 S.Ct. at 2020 (SCALIA, J., concurring in judgment) (calling the doctrine of substantive due process "an oxymoron").

sumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it.

I respectfully dissent.

Justice SOUTER, dissenting.

This case, like *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), invites the Court to examine the relationship between conditions imposed by development permits, requiring landowners to dedicate portions of their land for use by the public, and governmental interests in mitigating the adverse effects of such development. *Nollan* declared the need for a nexus between the nature of an exaction of an interest in land (a beach easement) and the nature of governmental interests. The Court treats this case as raising a further question, not about the nature, but about the degree, of connection required between such an exaction and the [412] adverse effects of development. The Court's opinion announces a test to address this question, but as I read the opinion, the Court does not apply that test to these facts, which do not raise the question the Court addresses.

First, as to the floodplain and greenway, the Court acknowledges that an easement of this land for open space (and presumably including the five feet required for needed creek channel improvements) is reasonably related to flood control, see *ante*, at 2317–2318, 2320, but argues that the "permanent recreational easement" for the public on the greenway is not so related, see *ante*, at 2320–2321. If that is so, it is not because of any lack of proportionality between permit condition and adverse effect, but because of a lack of any rational connection at all between exaction of a public recreational area and the governmental interest in providing for the effect of increased water runoff. That is merely an application of *Nollan*'s nexus analysis. As the Court notes, "[i]f petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public." *Ante*, at 2321. But that, of course, was not the fact, and the city of Tigard never sought to justify the public access portion of the dedication as related to flood control. It merely argued that whatever recreational uses were made of the bicycle path and the 1–foot edge on either side were incidental to the permit condition requiring dedication of the 15–foot easement for an 8–foot–wide bicycle path and for flood control, including open space requirements and relocation of the bank of the river by some 5 feet. It seems to me such incidental recreational use can stand or fall with the bicycle path, which the city justified by reference to traffic congestion. As to the relationship the Court examines, between the recreational easement and a purpose never put forth as a justification by the city, the Court unsurprisingly finds a recreation area to be unrelated to flood control.

[413] Second, as to the bicycle path, the Court again acknowledges the "theor[etically]" reasonable relationship between "the city's attempt to reduce traffic congestion by providing [a bicycle path] for alternative means of transportation," *ante*, at 2318, and the "correct" finding of the city that "the larger retail sales facility proposed by petitioner will increase traffic on the streets of the Central Business District," *ante*, at 2321. The Court only faults the city for saying that the bicycle path "could" rather than "would" offset the increased traffic from the store, *ante*, at 2322. That again, as far as I can tell, is an application of *Nollan*, for the Court holds that the stated connection ("could offset") between traffic congestion and bicycle paths is too tenuous; only if the bicycle path "would" offset the increased traffic by some amount could the bicycle path be said to be related to the city's legitimate interest in reducing traffic congestion.

I cannot agree that the application of *Nollan* is a sound one here, since it appears that the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally.* Having thus assigned the burden, the Court concludes that the city loses based on one word ("could" instead of "would"), and despite the fact that this record shows the connection the Court looks for. Dolan has put forward no evidence that [414]the burden of granting a dedication for the bicycle path is unrelated in kind to the anticipated increase in traffic congestion, nor, if there exists a requirement that the relationship be related in degree, has Dolan shown that the exaction fails any such test. The city, by contrast, calculated the increased traffic flow that would result from Dolan's proposed development to be 435 trips per day, and its Comprehensive Plan, applied here, relied on studies showing the link between alternative modes of transportation, including bicycle paths, and reduced street traffic congestion. See, *e.g.*, App. to Brief for Respondent A–5, quoting City of Tigard's Comprehensive Plan (" 'Bicycle and pedestrian pathway systems will result in some reduction of automobile trips within the community' "). *Nollan*, therefore, is satisfied, and on that assumption the city's conditions should not be held to fail a further rough proportionality test or any other that might be devised to give meaning to the constitutional limits. As Members of this Court have said before, "the common zoning regulations requiring subdividers to . . . dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Pennell v. San Jose*, 485 U.S. 1, 20, 108 S.Ct. 849, 862, 99 L.Ed.2d 1 (1988) (SCALIA, J., concurring in part and dissenting in part). The bicycle path permit condition is fundamentally no different from these.

In any event, on my reading, the Court's conclusions about the city's vulnerability carry the Court no further than *Nollan* has gone already, and I do not view this case as a suitable vehicle for taking the law beyond that point. The right case for the enunciation of takings doctrine seems hard to spot. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1076, 112 S.Ct. 2886, 2925, 120 L.Ed.2d 798 (1992) (statement of SOUTER, J.).

* See, *e.g.*, *Goldblatt v Hempstead*, 369 U.S. 590, 594–596, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962); *United States v. Sperry Corp.*, 493 U.S. 52, 60, 110 S.Ct. 387, 393–394, 107 L.Ed.2d 290 (1989). The majority characterizes this case as involving an "adjudicative decision" to impose permit conditions, *ante*, at 2390, n. 8, but the permit conditions were imposed pursuant to Tigard's Community Development Code. See, *e.g.*, § 18.84.040, App. to Brief for Respondent B–26. The adjudication here was of Dolan's requested variance from the permit conditions otherwise required to be imposed by the Code This case raises no question about discriminatory, or "reverse spot," zoning, which "singles out a particular parcel for different, less favorable treatment than the neighboring ones." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 132, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631 (1978).

512 U.S. 415, 129 L.Ed.2d 336

[415]HONDA MOTOR CO., LTD., et al., Petitioners,

v.

Karl L. OBERG.

No. 93–644.

Argued April 20, 1994.

Decided June 24, 1994.

Products liability action was brought against manufacturer of all-terrain vehicle (ATV), to recover for injuries suffered in accident. The Oregon Circuit Court entered judgment on jury verdict awarding plaintiff compensatory damages and $5 million in punitive damages, and manufacturer appealed.

APPENDIX #4

Banberry Development Corporation vs South Jordan City
631 P.2d 899 (Utah Supreme Court 1981)

evidence, in my view, of market value in this case. Even if it be conceded that the plaintiff's out-of-court statement as to the value of the well is sufficient to establish the value of the well, the testimony falls far short of providing a reasonable basis for determining market value of the whole parcel without a working well. Surely in this case such evidence would not have been hard to come by. The point cannot be avoided by the general principle that some uncertainty in evidence of damage is to be expected. That principle has especial application in cases dealing with lost profits because of lost sales, see *Winsness v. M. J. Conoco Distributors, Inc.*, Utah, 593 P.2d 1303 (1979); loss of good will; losses occasioned by inability to reduce unit costs; etc. These types of losses inevitably are burdened with considerable uncertainty because of the nature of the factors which must be considered. Market value, as a measure of damages, may give rise to conflicting testimony, but the basic factors to be considered are not so difficult to evaluate. In any event, there must be some evidence of market value, and there is none.

HOWE, J., concurs in the dissenting opinion of STEWART, J.

BANBERRY DEVELOPMENT CORPORATION, McKean Construction Company, Midwest Realty and Finance, Inc., a Utah corporation, Plaintiffs and Respondents,

v.

SOUTH JORDAN CITY, a municipal corporation, Defendant and Appellant.

No. 16872.

Supreme Court of Utah.

June 3, 1981.

Subdividers brought suit against city to challenge the validity of water connection and park improvement fees imposed as a condition to connection to the city water main and as a condition to final approval of the subdividers' plat. The Third District Court, Salt Lake County, Dean E. Conder, J., sustained validity of the park improvement fee, and granted city's motion to dismiss as to it and held the advance collection of water connection fee contrary to statutory law and granted subdividers' motion for summary judgment and both sides appealed. The Supreme Court, Oaks, J., held that advance collection of water connection fee from subdivider and a park improvement fee designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities would be valid provided they were reasonable.

Reversed and remanded.

Howe, J., filed separate opinion concurring in part and dissenting in part in which Maughan, C. J., joined.

1. Waters and Water Courses ⇐203(6)

Advance collection of water connection fee from subdivider and a park improvement fee designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities would be valid provided they were reasonable.

2. Municipal Corporations ⇐712
Waters and Water Courses ⇐203(6)

To comply with standard of reasonableness, a municipal fee related to services like water and sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred.

3. Municipal Corporations ⇐458

To determine equitable share of the capital costs to be borne by newly developed properties, a municipality should determine the relative burdens previously borne and yet to be borne by those properties in comparison with the other properties in the municipality as a whole and important factors to consider include: (1) the cost of existing capital facilities; (2) manner of financing existing capital facilities; (3) relative extent to which newly developed properties and other properties in municipality have already contributed to cost of existing capital facilities; (4) relative extent to which newly developed properties

and other properties in municipality will contribute to cost of existing capital facilities in the future; (5) extent to which municipality is requiring new developers or owners to provide common facilities that have been provided by municipality and financed through general taxation or other means; (6) extraordinary costs in servicing newly developed properties; and (7) time-price differential inherent in fair comparisons of amounts paid at different times.

4. **Municipal Corporations** ⇐458

In determining reasonableness of a fee for municipal services, courts must concede municipalities the flexibility necessary to deal realistically with questions not susceptible of exact measurement and precise mathematical equality is neither feasible nor constitutionally vital.

5. **Municipal Corporations** ⇐167

Municipal officials must have legal power to deal creatively with extraordinary or unforeseen circumstances in provision of municipal services.

6. **Municipal Corporations** ⇐122(2)

A municipality's exercise of its legislative powers is entitled to a presumption of constitutionality.

7. **Water and Water Courses** ⇐203(12)
Zoning and Planning ⇐685

As the information that must be used to assure that sudivision fees are within the standard of reasonableness is most accessible to the municipality, that body should disclose the basis of its calculations to whoever challenges the reasonableness of its subdivision or water hookup fees.

8. **Water and Water Courses** ⇐203(12)
Zoning and Planning ⇐685

Once the municipality has disclosed the basis of its calculations for its subdivision or water hookup fees to those who challenge the reasonableness of the fees, the burden of showing failure to comply with constitutional standard of reasonableness is on the challengers.

9. **Municipal Corporations** ⇐458

Park improvement fees should be fixed so as to be equitable in light of relative benefits conferred on, as well as relative burdens previously borne and yet to be borne by, newly developed properties in comparison with the other properties in municipality as a whole and fees should not exceed amount sufficient to equalize the relevant benefits and burdens of newly developed and other properties.

Michael J. Mazuran, Salt Lake City, for defendant and appellant.

John H. McDonald, Craig S. Cook, Salt Lake City, for plaintiffs and respondents.

OAKS, Justice:

This is a suit by three subdividers against a city to challenge the validity of water connection and park improvement fees imposed as a condition to connection to the city water main and as a condition to final approval of the subdividers' plat. At issue in this appeal are the legality of any such fees, and, if they are legal, the criteria for judging their reasonableness.

The procedure for charging the park improvement fee does not appear in the record. City Ordinance 13–1–5, which the subdividers concede was lawfully enacted and constitutional, requires a subdivider who desires to connect to the city water system to enter into an agreement "specifying the terms and conditions under which the water extensions and connection shall be made and the payment that shall be required." Paragraph 10 of the agreement form adopted by the city and required of all subdividers before plat approval obligates the subdividers to pay the entire cost of all water lines required to service the subdivision, including extensions from existing water mains and all connecting lines within the subdivision. It also provides that "the City shall charge the Applicant a connection fee in the amount of $_____ for each individual dwelling unit to be served within the subdivision, which sum shall be payable in full to the City before the subdivision system is connected to any existing City water mains." The required connection fee was $800 for a ¾-inch line and $1,000 for a 1-inch line.

Objecting that the collection of the water connection fees in advance from the developer constituted an unlawful tax and an unconstitutional taking of property without due process, the subdividers sought injunctive relief. They challenged the city's park improvement fee of $235 per lot on the same basis. They also attacked both fees as discriminatory.

On motions in advance of trial, the district court (1) sustained the validity of the park improvement fee and granted the city's motion to dismiss as to it, and (2) held the advance collection of the water connection fee contrary to statutory law, granted the subdividers' motion for summary judgment, and permanently enjoined the city from its enforcement. Both the city and the subdividers have appealed.

I.
THE VALIDITY OF WATER CONNECTION AND PARK IMPROVEMENT FEES

[1] The district court ruled that the advance collection of the water connection fee was rendered illegal by the combined effect of U.C.A., 1953, § 10–8–38 and § 17–6–22. Section 10–8–38 empowers the city, for the purpose of defraying costs of construction or operation of a sewer system, to require mandatory hookup and payment of charges when a sewer is available and within 300 feet of any property containing a building used for human occupancy. Section 17–6–22 provides that a municipal corporation which contracts with an improvement district for sewage services shall have authority to make service charges to parties who connect to its sewer system. If the municipality also operates a waterworks system, the section provides that these charges "may be combined with the charge made for water furnished by the water system and may be collected and the collection thereof secured in the same manner as that specified in Section 10–8–38, Utah Code Annotated 1953."

Because § 10–8–38 does not authorize the charging of a sewer connection fee in the case of vacant lots, and because § 17–6–22 provides that the city *may* collect water fees in the same manner as § 10–8–38 authorizes for the collection of sewer fees, the combination of these two statutes is urged to *forbid* cities from collecting water fees in circumstances not authorized for sewer fees. This does not follow. Section 17–6–22 is permissive, not mandatory. It poses no statutory prohibition against the collection of a water connection fee from a subdivider for each lot in a subdivision at the time the subdivision is hooked up to the city water system.

The validity of a sewer connection fee to raise money to enlarge and improve a sewer system was sustained by this Court in *Home Builders Ass'n v. Provo City*, 28 Utah 2d 402, 503 P.2d 451 (1972), discussed hereafter. In a decision issued after the trial court acted in this case, we sustained a municipality's power to withhold the privilege of city water service until a landowner had paid a valid municipal sewer connection fee. *Rupp v. Grantsville City*, Utah, 610 P.2d 338 (1980). In two other decisions issued after the trial court acted in this case, we sustained a municipality's requirement that subdividers dedicate a portion of subdivision land for recreational purposes (or pay cash in lieu) as a condition of final approval of their plat. *Call v. City of West Jordan*, Utah, 606 P.2d 217 (1979). On rehearing in this same case, we held that the reasonableness of the dedication or cash requirement in a particular case was a question of fact that must be resolved at trial. *Call v. City of West Jordan*, Utah, 614 P.2d 1257 (1980).

These four decisions have resolved the legality of water connection and park improvement fees designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities, as well as the legality of conditioning water hookups or plat approval on their collection. However, these decisions leave open the question of the reasonableness of any individual fee charged or land dedication required. This question of reasonableness must be resolved on the facts in each particular case. We therefore reverse both judgments and remand the entire case for trial

on the reasonableness of the fees the city has imposed in this case.

Because this case is being remanded for trial, it is appropriate for this Court to elaborate on the constitutional standards of reasonableness that should govern the validity of subdivision charges such as these.

II.

THE REASONABLENESS OF SUBDIVISION FEES IN GENERAL

Like so many other municipalities in this state, the City of South Jordan confronts the problems of providing a fast-growing city with adequate services for water, sewer, recreation, and other common needs. In 1978, the city had to deal with the development of about 600 lots (including the 400 in subdividers' development), up from about 65 in prior years. Such growth puts a severe strain on the financial and personnel resources of a small municipality, and if not properly managed could well overburden common facilities like water and sewer to the point where their service would deteriorate severely for the existing occupants and be inadequate for the new ones. An appropriate way to provide adequately for such services is by advance planning and financing.

The conventional means of financing municipal facilities are tax revenues, special assessments, and bonding. In addition, in recent years many local governmental units in this country have employed subdivision plat controls to require fees, such as the water and park fees involved in this case, that force developers to contribute to the centralized capital costs of municipal services in addition to the concededly valid localized costs applicable solely to their development. The courts of this state and others have approved the legality of such fees, but are still struggling to define the limits of reasonableness that must be imposed upon their amount.[1] Without legal limits—imposed by statute or constitution—subdivision charges could easily be used to avoid statutory requirements for bonding municipal improvements, statutory limits on municipal taxation, and legal limits on restrictive or exclusionary zoning.

The subdividers argue that the water and park fees far exceed the city's costs in respect to these matters and that the excess would be used in the city's general operating fund. The city maintains in its brief in this Court that the water connection fees would be used to enlarge water lines and storage and pumping facilities, and the park improvement fees would be used to enlarge and develop city parks. The parties differ on whether such an intent was secured by enforceable restriction, such as deposit to a separate fund. These contentions, all relevant to reasonableness, are matters for consideration at trial.

The subdividers also argue that the water connection fee cannot be imposed on the developer, but must be deferred for imposition on the lot owner or homeowner at the time of hookup. We find this argument unpersuasive. This is not a case where the party burdened with the exaction will derive no benefit from it.[2] When the subdivision is connected to the city's water and sewer systems, the city must be prepared to perform its services on demand, and from that fact the subdividers derive immediate benefit. The provision of standby capacity to a subdivision requires the commitment of substantial capital. The city does not have to wait until someone turns on a tap or flushes a toilet before it requires participation in the cost of providing its services. Subject to the requirements of reasonableness discussed below, a hookup fee that requires a subdivider to make advance payment of some portion of the common capital costs attributable to committing service to the lots in the subdivision is valid. The same is true of the park improvement fee.

The proceedings on remand in this case will be governed by two leading decisions of this Court, one dealing with a municipal service that employs an expensive central

1. J. Johnson, "Constitutionality of Subdivision Control Exactions: The Quest for a Rationale," 52 Cornell L.Q. 871 (1967); Heyman & Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions," 73 Yale L.J. 1119 (1964).

2. *City and County of Denver v. Greenspoon*, 140 Colo. 402, 344 P.2d 679 (1959).

facility like water or sewer, and the other with a municipal service that employs dispersed resources like recreational land. Though the standards of reasonableness in these two circumstances are essentially the same, their application is somewhat different. The two different types of charges will therefore be discussed separately.

III.
REASONABLENESS OF WATER CONNECTION FEE

[2] *Home Builders Ass'n v. Provo City*, 28 Utah 2d 402, 503 P.2d 451 (1972), sustained the validity of a sewer connection fee (in addition to the monthly sewer charge) for each living unit of newly constructed buildings connected to an existing sewer system. The fee was imposed in order to improve and enlarge the sewer system. It was not a revenue measure or an assessment, the court found, but "a reasonable charge for the use thereof," as authorized by U.C.A., 1953, § 10–8–38. Significantly, the $100-per-lot charge was derived by dividing the total number of sewer connections in the municipality into the net value of the sewer system, and the funds obtained were to be restricted to the enlargement, improvement, and operation of the sewer system and to the retirement of indebtedness incurred in its construction.

In approving the sewer connection fee in *Home Builders*, this Court relied on *Airwick Industries, Inc. v. Carlstadt Sewerage Authority*, 57 N.J. 107, 270 A.2d 18 (1970). That case approved a connection fee arrangement by which the capital and interest costs of a new central sewage system, although met initially by the actual users, would ultimately be borne by all properties benefited, including lands that were unimproved when the central expenditures were originally made. The municipality did this by including as part of its connection fee what our Court characterized as "a sum of money which would represent a fair contribution by the connecting party toward the expense theretofore met by others." [3]

The *Home Builders* case established the principle upon which the reasonableness of the water connection fee in this case should be judged. The "fair contribution" of the connecting party should not exceed "the expense thereof met by others." Or, as the New Jersey Supreme Court held in a subsequent case, the rules governing the allocation of improvement costs between city and developer

> would ideally have been such as to insure, to the greatest extent practicable, that the cost of extending a municipal water facility would fall equitably upon those who are similarly situated and in a just proportion to benefits conferred. They should be sufficiently flexible to permit consideration to be given to the facts and circumstances of each particular case.

Deerfield Estates, Inc. v. Township of E Brunswick, 60 N.J. 115, 286 A.2d 498, 505 (1972). Therefore, where the fee charged a new subdivision or a new property hookup exceeds the direct costs incident thereto (as a means of sharing the costs of common facilities), the excess must survive measure against the standard that the total costs "fall equitably upon those who are similarly situated and in a just proportion to benefits conferred." Stated otherwise, to comply with the standard of reasonableness, a municipal fee related to services like water and sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred.

[3] To determine the equitable share of the capital costs to be borne by newly developed properties, a municipality should determine the relative burdens previously borne and yet to be borne by those properties in comparison with the other properties in the municipality as a whole; the fee in question should not exceed the amount sufficient to equalize the relative burdens of newly developed and other properties.

Among the most important factors the municipality should consider in determining the relative burden already borne and yet

3. *Home Builders Ass'n v. Provo City*, 28 Utah 2d at 405, 503 P.2d at 453.

to be borne by newly developed properties and other properties are the following, suggested by the well-reasoned authorities cited below: (1) the cost of existing capital facilities; (2) the manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants); (3) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as user charges, special assessments, or payment from the proceeds of general taxes); (4) the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future; (5) the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by the municipality and financed through general taxation or other means (apart from user charges) in other parts of the municipality; (6) extraordinary costs, if any, in servicing the newly developed properties; and (7) the time-price differential inherent in fair comparisons of amounts paid at different times. *Home Builders v. Provo City, supra; Rose v. Plymouth Town*, 110 Utah 358, 173 P.2d 285 (1946); *Airwick Industries, Inc. v. Carlstadt Sewerage Authority, supra; Deerfield Estates, Inc. v. Township of E. Brunswick, supra; West Park Ave., Inc. v. Township of Ocean*, 48 N.J. 122, 224 A.2d 1 (1966); *Rutan Estates, Inc. v. Town of Belleville*, 56 N.J.Super. 330, 152 A.2d 853 (App.Div.1959); *Zehman Construction Co. v. City of Eastlake*, 92 Ohio Law Abst. 364, 195 N.E.2d 361 (Ct.App. 1962); *Strahan v. City of Aurora*, 38 Ohio Misc. 37, 311 N.E.2d 876 (Ct.Com.Pleas, 1973); R. Ellickson, "Suburban Growth Controls: An Economic and Legal Analysis," 86 Yale L.J. 385, 467–89 (1977); F. Michelman & T. Sandalow, *Government in Urban Areas*, 533–36 (1970).

[4, 5] In adjudicating the validity of any individual application of this standard of reasonableness, the courts must concede municipalities the flexibility necessary to deal realistically with questions not susceptible of exact measurement. Precise mathematical equality "is neither feasible nor constitutionally vital." *Airwick Industries, Inc. v. Carlstadt Sewerage Authority, supra*, 270 A.2d at 26. Similarly, municipal officials must also have the legal power to deal creatively with extraordinary or unforeseen circumstances in the provision of municipal services. *Rose v. Plymouth Town*, 110 Utah 358, 173 P.2d 285 (1946). We agree with and adopt the New Jersey court's ruling in *Deerfield Estates, Inc. v. Township of E. Brunswick, supra*, 286 A.2d at 507–508:

> The rule we lay down must be given a pragmatic application. Complete equality of treatment may sometimes be impossible, especially where a municipality has followed no set pattern with respect to past extensions. Nor should a municipality be denied the right to modify an established pattern where altered circumstances reasonably so dictate. Equality of treatment may upon occasion be forced to give way before some supervening public interest. But insofar as such equality can reasonably be achieved this must be done.

[6–8] The required flexibility will be implemented by the presumption of constitutionality incident to a municipality's exercise of its legislative powers. *Call v. City of West Jordan*, Utah, 614 P.2d 1257, 1258 (1980); *Crestview-Holladay Homeowners Ass'n, Inc. v. Engh Floral Co.*, Utah, 545 P.2d 1150 (1976); *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723 (1953). Since the information that must be used to assure that subdivision fees are within the standard of reasonableness is most accessible to the municipality, that body should disclose the basis of its calculations to whoever challenges the reasonableness of its subdivision or hookup fees. Once that is done, the burden of showing failure to comply with the constitutional standard of reasonableness in this matter is on the challengers. *Home Builders Ass'n of Greater*

Kansas City v. City of Kansas City, Mo., 555 S.W.2d 832 (1977).

IV.

REASONABLENESS OF PARK IMPROVEMENT FEE

[9] In *Call v. City of West Jordan*, Utah, 606 P.2d 217 (1979), opinion on rehearing, 614 P.2d 1257 (1980), this Court upheld the validity of a city ordinance that required subdividers, as a condition of plat approval, to dedicate certain proposed subdivision land to the city (or pay cash in lieu) for flood control and/or park and recreation facilities. In remanding the case for trial on the constitutionality of the ordinance as applied (i. e., the requirement that seven percent of the subdivision land be dedicated), this Court ruled that "the dedication should have some reasonable relationship to the need created by the subdivision." *Id.* at 1258. The Court quoted the following from *Home Builders Ass'n of Greater Kansas City v. City of Kansas City*, Mo., 555 S.W.2d 832, 835 (1977):

> [I]f the burden cast upon the subdivider is *reasonably* attributable to his activity, then the requirement [of dedication or fees in lieu thereof] is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than a reasonable regulation under the police power.[4]

Reasonableness obviously holds the municipality to a higher standard of rationality than the requirement that its actions not be arbitrary or capricious.

Under the reasonableness test in *Call v. City of West Jordan, supra*, the benefits derived from the exaction need not accrue solely to the subdivision (614 P.2d at 1259); flood control and recreation are needs that cannot be treated in isolation from the rest of the municipality. At the same time, the benefits derived from the exaction must be of "demonstrable benefit" to the subdivision (*Id.* at 1259).

As with water connection fees, the amount of such exactions or fees should be such that the burden of providing these municipal services "falls equitably upon those who are similarly situated and in a just proportion to benefits conferred." *Deerfield Estates, Inc. v. Township of E. Brunswick*, 60 N.J. 115, 286 A.2d 498, 505 (1971). The measurement of "benefits conferred" may have a more significant impact on the reasonableness of park fees than on water connection fees. The central facilities that support water and sewer service would generally confer the same benefits in every part of the municipality, but the benefits conferred by recreational, flood control, or other dispersed resources may be measurably different in different parts of the municipality. Park improvement fees should therefore be fixed so as to be equitable in light of the relative benefits conferred on, as well as the relative burdens previously borne and yet to be borne by the newly developed properties in comparison with the other properties in the municipality as a whole. The fees in question should not exceed the amount sufficient to equalize the relative benefits and burdens of newly developed and other properties.

The factors to be considered in the determination of relative burden are similar to the factors discussed in Part III in connection with water connection fees. The flexibility to be tolerated within the presumption of regularity and the disclosure of the basis of calculation specified in Part III is also applicable to this type of subdivision charge.

The judgments of the trial court are reversed in the appeal and the cross-appeal, and the cause is remanded for proceedings consistent with this opinion. No costs awarded.

HALL and STEWART, JJ., concur.

HOWE, Justice (concurring and dissenting):

I concur that the defendant city may lawfully require water connection fees to be paid at the time the main line running through the subdivision is connected to the city system and water is brought to the edge of each lot. I arrive at this conclusion

4. *Call v City of West Jordan*, 614 P.2d at 1259.

in view of the authority invested in cities and towns to "construct, maintain and operate waterworks," § 10–8–14 U.C.A.1953; to "fix the rates to be paid for the water use," § 10–8–22; and to "enact ordinances, rules and regulations for the management and conduct of the waterworks system owned or controlled by it," § 10–7–14. It is not unreasonable to require payment of the connection fee when the water is turned into the main line coursing through the subdivision because at that time the defendant city is obligated to furnish water to each and every lot as requested. In order to prepare to do this, the defendant city had to make capital expenditures to enlarge its capacity so that it could meet the new demands to be imposed upon it. I concur that § 10–8–38 is not a prohibition against advance collection.

I also concur with the criteria of reasonableness contained in Parts III and IV of the majority opinion.

I dissent, however, from the holding in the majority opinion that the city may lawfully impose park improvement fees. I concur with the reasoning of Justice Wilkins in his dissenting opinion in *Call v. City of West Jordan,* Utah, 606 P.2d 217 (1979). The imposition of the park improvement fees is even more offensive in this case since the city conditioned the furnishing of water service to the subdivision upon their payment. To me the two subjects are entirely separate and I believe it to be an abuse of the city's authority to own and operate a waterworks system (a proprietary operation) to use the furnishing of water as leverage to collect fees for other unrelated purposes. Section 10–8–38 authorizes cities and towns to discontinue water service to premises where the sewer service charges have not been paid, but I find no authorization to also deny service until park improvement fees have been paid.

MAUGHAN, C. J., concurs in the opinion of HOWE, J.

Betty Harper CULBERTSON, Executrix of the Estate of Joyce K. Culbertson, and as an individual, Plaintiff and Respondent,

v.

CONTINENTAL ASSURANCE COMPANY, a Tennessee corporation, Chicago Bridge and Iron Company Profit-Sharing Plan Trust, an Illinois Trust, Beth Rowley Culbertson Conrad, an individual, Loretta Culbertson, an individual, Richard Culbertson, an individual, Chrystella Culbertson, an individual, and Elizabeth Culbertson, an individual, Defendants and Appellants.

No. 17148.

Supreme Court of Utah.

June 4, 1981.

Decedent's second wife brought action as executrix to have proceeds of a profit-sharing plan and certain insurance policies awarded to decedent's estate rather than to decedent's first wife as his designated beneficiary. The Third District Court, Salt Lake County, Bryant H. Croft, J., awarded plaintiff proceeds of profit-sharing plan and defendant proceeds of insurance policies, and defendant appealed and plaintiff cross appealed. The Supreme Court, Maughan, C. J., held that; (1) defendant was entitled as decedent's first wife to proceeds of profit-sharing plan, interest to which vested in her on decedent's death, where decedent neither changed designated beneficiary not as moving party in divorce action sought explicit relinquishment of defendant's expectancy, and there were no broad, comprehensive provisions in decree of divorce which could reasonably be construed as a relinquishment or waiver of any or all expectancies, and (2) where decree of divorce between defendant and decedent as her first husband did not by its terms expressly terminate defendant's status as a benefi-

APPENDIX #5

SALT LAKE COUNTY "highway-abutting" Ordinance

Title 15 BUILDINGS AND CONSTRUCTION

Chapter 15.28 HIGHWAY DEDICATION

15.28.010 Dedication and improvement required.

Except as otherwise provided in Section 15.28.020, no building or structure shall be erected, reconstructed, structurally altered or enlarged, and no building permit shall be issued therefor, on any lot or parcel of land which abuts a major or secondary highway, as shown on the map entitled, "The County Transportation Improvement Plan," on file with the planning and development services division and made part of this chapter by reference, or other public street which does not conform to current county width standards, unless the portion of such lot or parcel within the right-of-way of the highway to be widened or additional required street width has been dedicated to the county and improved. The dedication and improvements shall meet the standards for such highway or street as provided in Section 15.28.060. (Ord. 1473 (part), 2001: Ord. 961 § 1 (part), 1986: prior code § 2-6-1)

APPENDIX #6

Section 63-90a-1 et seq, Utah Code

CHAPTER 90a

CONSTITUTIONAL TAKING ISSUES

Section
63-90a-1. Definitions.
63-90a-2. Applicability of chapter.
63-90a-3. Political subdivisions to adopt guidelines.
63-90a-4. Appeals of decisions.

63-90a-1. Definitions.

As used in this chapter:

(1) "Constitutional taking issues" means actions involving the physical taking or exaction of private real property by a political subdivision that might require compensation to a private real property owner because of:

(a) the Fifth or Fourteenth Amendment of the Constitution of the United States;

(b) Article I, Section 22 of the Utah Constitution; or

(c) any recent court rulings governing the physical taking or exaction of private real property by a government entity.

(2) "Political subdivision" means a county, municipality, special district, school district, or other local government entity. 1994

63-90a-2. Applicability of chapter.

This chapter does not apply when a political subdivision formally exercises its power of eminent domain. 1994

63-90a-3. Political subdivisions to adopt guidelines.

(1) Each political subdivision shall enact an ordinance establishing guidelines to assist them in identifying actions involving the physical taking or exaction of private real property that may have constitutional taking issues.

(2) Each political subdivision shall consider the guidelines required by this section when taking any action that might result in the physical taking or exaction of private real property.

(3) (a) The guidelines adopted under the authority of this section are advisory.

(b) A court may not impose liability upon a political subdivision for failure to comply with the guidelines required by this section.

(c) The guidelines neither expand nor limit the scope of any political subdivision's liability for a constitutional taking. 1994

63-90a-4. Appeals of decisions.

(1) Each political subdivision shall enact an ordinance that:

(a) establishes a procedure for review of actions that may have constitutional taking issues; and

(b) meets the requirements of this section.

(2) (a) (i) Any owner of private property whose interest in the property is subject to a physical taking or exaction by a political subdivision may appeal the political subdivision's decision within 30 days after the decision is made.

(ii) The legislative body of the political subdivision, or an individual or body designated by them, shall hear and approve or reject the appeal within 14 days after it is submitted.

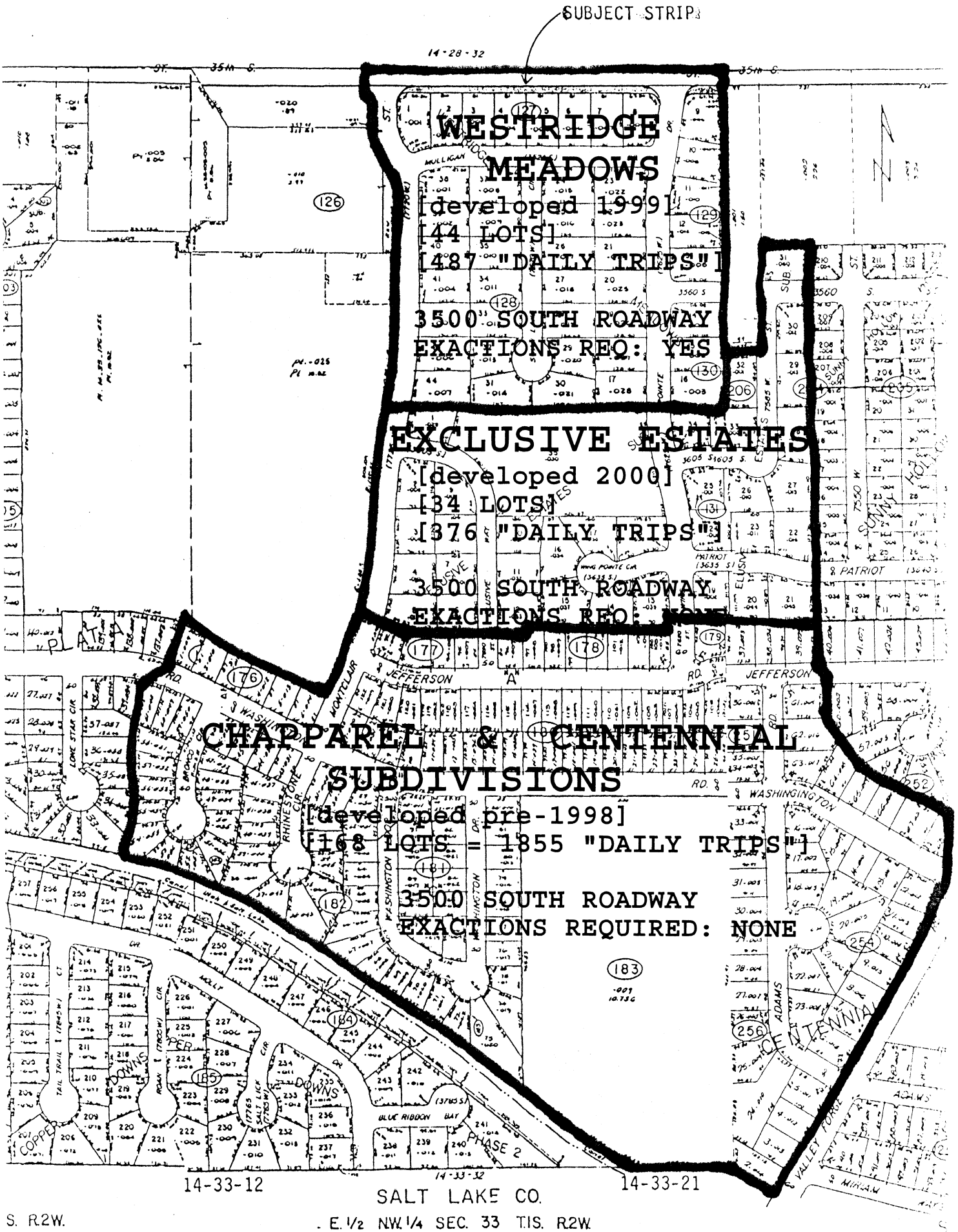
(iii) If the legislative body of the political subdivision fails to hear and decide the appeal within 14 days, the decision is presumed to be approved.

(b) The private property owner need not file the appeal authorized by this section before bringing an action in any court to adjudicate claims that are eligible for appeal.

(c) A property owner's failure to appeal the action of a political subdivision does not constitute, and may not be interpreted as constituting, a failure to exhaust available administrative remedies or as a bar to bringing legal

APPENDIX #7

"Westridge Meadows" subdivision area map


SUBJECT STRIP
14-28-32
WESTRIDGE MEADOWS
[developed 1999]
[44 LOTS]
[487 "DAILY TRIPS"]
3500 SOUTH ROADWAY
EXACTIONS REQ: YES
EXCLUSIVE ESTATES
[developed 2000]
[34 LOTS]
[376 "DAILY TRIPS"]
3500 SOUTH ROADWAY
EXACTIONS REQ: NONE
CHAPPAREL & CENTENNIAL SUBDIVISIONS
[developed pre-1998]
[168 LOTS = 1855 "DAILY TRIPS"]
3500 SOUTH ROADWAY
EXACTIONS REQUIRED: NONE
14-33-12
14-33-32
14-33-21
SALT LAKE CO.
S. R.2W.
. E. 1/2 NW. 1/4 SEC. 33 T.1S. R.2W.
W. 1/2

APPENDIX #8

COUNTY "Individualized Determination" document

January 24 2001

Bam Development

EXHIBIT 11

822' frontage

1997 adt 35005 12910
1998 " " 13385 } 4% increase

2015 adt ~~projected~~ 17000 vpd
2020 adt projected 23000 vpd

If current 4% keeps up 2020 = 29000 vpd

typically design for level of service C (LOS)

development traffic 487 vpd

Currently roadway = 3 lanes

LOS D

LOS E = 15952 vpd (3 lanes)
LOS C = 29000 (7 lanes)

on cusp of failing - requires widening to 7 lanes by year 2020

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Salt Lake County District Attorney
By: JOHN P. SOLTIS (#3040)
Attorneys for Salt Lake County Defendants
2001 South State Street #S3400
Salt Lake City, Utah 84190-3000
Telephone: (801) 468-2661

IN THE THIRD JUDICIAL DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

B.A.M. DEVELOPMENT, Plaintiff, -vs- SALT LAKE COUNTY, Defendant,	PARTIAL ANSWER OF PLAINTIFF'S FIRST SET OF INTERROGATORIES AND PRODUCTION OF DOCUMENTS Civil No. 980908157CD Judge Hanson

The above-named Defendant, Salt Lake County, by and through Deputy Salt Lake County District Attorney John P. Soltis, in partial answer to Plaintiff's First Set of Interrogatories and Production of documents:

INTERROGATORY No. 1. Identify and fully describe the need (or in your opinion the claimed need created by the development of subject subdivision) for roadway improvements to 3500 South Street in excess of the 33 - foot "half-width".

INTERROGATORY No. 8. Identify and fully describe the development, platting, approval and recordation of the development and/or issuance of a development approval for the Westridge Meadows subdivision development.

ANSWER: *This Interrogatory will be answered in the Supplemental Answers to Interrogatories.*

INTERROGATORY No. 9. Identify and fully describe:

A. The COUNTY's "individualized determination", if any, concerning the public roadway needs created by development of the subject subdivision and/or evidencing or supporting the conclusion there is a "rough proportionality" between the dedication from the Plaintiff and the corresponding needs created by the development of the subject subdivision.

B. The calculations indicating that the COUNTY has made "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

C. The calculations indicating that the County has made "some effort to quantify its findings" in support of the required dedication and improvement of the widened 3500 South Street public roadway "half-width".

ANSWER: See Exhibit 11.

INTERROGATORY No. 10. Identify and fully describe the preparation, promulgation, adoption and/or implementation of an "official map" or "major street plan", including but not limited to the resolutions or other documentation of the governing body of the COUNTY confirming such "adoption" of the "official map" or "major street plan".

RESPONSE: *This Production Request will be answered in the Supplemental Answers to Interrogatories.*

REQUEST FOR PRODUCTION OF DOCUMENTS No. 18. Produce all documents you intend to introduce as evidence in the trial of this case.

RESPONSE: Attached.

REQUEST FOR PRODUCTION OF DOCUMENTS #19. Produce all documents identified or referred to in your answers to PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT SALT LAKE COUNTY.

RESPONSE: Attached.

DATED this 29th day of January, 2001

Andrea Pullos
Salt Lake County Transportation Engineer;

NOTARY PUBLIC
MARTIN S. KNAPHUS
2001 So. State St. #N3600
Salt Lake City, UT 84190
My Commission Expires
February 6, 2004
STATE OF UTAH

SUBSCRIBED and SWORN to before me this 29th day of January, 2001.

NOTARY PUBLIC
Residing in Salt Lake County

DAVID E. YOCOM
Salt Lake District Attorney

JOHN P. SOLTIS
Deputy District Attorney